Workers' Compensation Appeals Tribunal

COMPENSATION APPEALS FORUM

Tribunal d'appel des accidents du travail

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COMPENSATION APPEALS FORUM

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Compensation Appeals Forum is a publication of the Workers' Compensation Appeals Tribunal and is available free of charge. The views and opinions expressed herein are those of the authors and do not necessarily represent those of the Tribunal. The *Compensation Appeals Forum* invites submissions of papers, case comments, letters, etc., in English or French, discussing Tribunal decisions, processes, or compensation law principles relevant thereto, for consideration for publication. The Editorial Board reserves the right to reject, edit, or condense all submissions and does not assume responsibility for the loss or return of manuscripts. The contents may not be reproduced in any form without written authorization.

From the Editors . . .

Welcome to the third issue of the *Compensation Appeals Forum*, published by the Workers' Compensation Appeals Tribunal of Ontario. The Tribunal, under the chairmanship of S. Ronald Ellis, Q.C., determines appeals arising under the *Workers' Compensation Act* and appeals from decisions of the Workers' Compensation Board of Ontario respecting entitlement to compensation or benefits, and assessments or penalties. It also determines the effect of the Act on workers' rights to take civil actions against their employers. In the *Forum*, we publish analytical comment from our constituencies and other observers concerning the Tribunal's decisions, processes, and general compensation principles related thereto. Our first issue, which was published in October 1986, featured a short history of the Tribunal, and discussions of the role of Tribunal counsel and of some Tribunal decisions concerning psychogenic pain. In the second issue, we were pleased to present six articles ranging from a review of the Tribunal's treatment of the available work issue in *Decision No. 2*, to a more general study of workers' compensation coverage for farm workers. In this issue, we present six articles and two shorter "Notes". There is also a "Letters to the Editor" column which contains a response by the Chairman of the Appeals Tribunal to an article by Mr. Michael Cormier in Vol. 2, No. 1, as well as an invitation by Dr. Roger Rickwood on behalf of the Editorial Board for members of the community to write articles on workers' compensation and legal causation for a special edition of the *Forum* in 1988. This invitation was prompted by a letter from Ms. Nicole Godbout.

We invite our readers to submit papers, case comments, letters, and replies to articles appearing in previous issues, etc. for consideration for publication. We are looking for constructive comments about, or an analysis of, Tribunal decisions and processes, or related general compensation issues. It is our hope that comment from one perspective will trigger further comment, so that the *Forum* will be the focal point of a dynamic exchange of views. It is our goal that the *Forum* become a source of ideas and perspectives referred to at Tribunal hearings.

Please send submissions directly to the Editorial Board, *Compensation Appeals Forum*, Research and Publications Department, Workers' Compensation Appeals Tribunal, 505 University Avenue, 7th Floor, Toronto, Ontario, M5G 1X4, telephone (416) 598-0638. Alternatively, you may send your article to us by FAX at 979-8324. Submissions will be reviewed by an editorial board established within the Research and Publications Department, and will not be seen by decision-making members of the Tribunal until they are published. The editorial board reserves the right to reject, edit, or condense all submissions, and does not assume the responsibility for the loss or return of manuscripts. Copies of the *Forum* may be obtained from the Research and Publications Department or by completing the order form at the back of this issue.

We look forward to reading your contribution!

R. Rickwood (Chairman, Editorial Board)
A. Somerville
A. Worland
M. Goldstein

FORUM SUR LES APPELS EN MATIÈRE D'ACCIDENTS DU TRAVAIL
Vol. 2, Nº 2 (octobre 1987)

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Forum sur les appels en matière d'accidents du travail est une publication gratuite du Tribunal d'appel des accidents du travail. Les vues et opinions qu'elle contient sont celles des auteurs et ne représentent pas nécessairement celles du Tribunal. La rédaction de *Forum sur les appels en matière d'accidents du travail* examinera, pour fins de publication, tout article, commentaire sur des causes, lettre ou autre texte que voudront bien lui soumettre ses lecteurs, en anglais ou en français, au sujet des décisions et procédés du Tribunal ou des principes juridiques d'indemnisation qui s'y rapportent. Le conseil de rédaction se réserve le droit de rejeter, de mettre au point ou de condenser tous les documents soumis et ne se tient pas responsable de leur perte éventuelle ni de leur retour.

Message de la rédaction

Nous vous invitons cordialement à lire le troisième numéro du Forum des appels des accidents du travail, publié par le Tribunal d'appel des accidents du travail de l'Ontario. Sous la présidence de S. Ronald Ellis, C.R., le Tribunal juge les appels interjetés en vertu de la Loi sur les accidents du travail et les appels des décisions de la Commission des accidents du travail de l'Ontario au sujet de l'admissibilité à une indemnité ou à des prestations, et des évaluations et des pénalités. Le Tribunal définit aussi les effets de la Loi sur le droit des travailleurs d'intenter des actions judiciaires civiles contre leur employeur. Nous faisons paraître, dans le Forum, des commentaires analytiques provenant de nos circonscriptions et d'autres observateurs sur les décisions et les méthodes du Tribunal de même que sur ses principes généraux d'indemnisation. Notre premier numéro, paru en octobre 1986, contenait un bref historique du Tribunal, un article sur des discussions au sujet du rôle du conseiller du Tribunal et quelques décisions du Tribunal traitant des douleurs psychogéniques. Dans le second numéro, nous avions le plaisir de présenter six articles sur des sujets variés allant de l'examen de la décision nº 2 du Tribunal sur la question de la disponibilité des emplois jusqu'à une étude plus générale de la protection, en matière d'indemnité, des travailleurs agricoles. Dans le présent numéro, nous publions six articles et deux commentaires plus petits. Il s'y trouve aussi une rubrique "Lettres au rédacteur" qui contient la réponse du président du Tribunal d'appel à un article de M. Michael Cormier, dans le vol. 2, nº 1, ainsi qu'une invitation, adressée aux membres de la communauté par le Dr Roger Rickwood au nom du Conseil de rédaction, à écrire des articles sur l'indemnisation des travailleurs et le rapport de causalité juridique en vue d'une publication spéciale de Forum en 1988. C'est une lettre de Mme Nicole Godbout qui est à l'origine de cette invitation.

Nous convions nos lecteurs à nous remettre, entre autres, des articles, leurs commentaires sur des cas et des réponses à nos propres articles parus dans les numéros précédents, dont nous serons heureux d'envisager la publication. Nous cherchons à obtenir des commentaires constructifs ou analytiques sur les décisions et les méthodes du Tribunal ou sur les questions générales d'indemnisation connexes. Nous espérons en effet que l'expression d'un certain point de vue provoquera d'autres commentaires avec ce résultat que Forum deviendra le point de mire d'un échange animé d'opinions. Notre but est que Forum devienne une source d'idées et de prespectives auxquelles il est fait allusion lors des audiences du Tribunal.

Veuillez envoyer vos articles directement au Conseil de rédaction. Forum des appels des accidents du travail, Service des recherches et des publications, Tribunal d'appel des accidents du travail, 505, avenue University, 7e étage, Toronto (Ontario), M5G 1X4, téléphone: (416) 598-4638. Vous pouvez aussi nous envoyer votre article par FAX en composant le 979-8324. Vos contributions seront examinées par un conseil de rédaction faisant partie du Service des recherches et des publications et, avant leur publication éventuelle, ne seront pas vus par les membres du Tribunal, auteurs des décisions. Le Conseil de rédaction se réserve le droit de refuser, de réviser ou de condenser tout article remis et décline toute responsabilité pour la perte ou le renvoi des manuscripts reçus. On peut se procurer des exemplaires de Forum auprès du Service des recherches et des publications, ou en remplissant le bon de commande au dos du présent numéro.

Nous nous réjouissons d'avance de lire ce que vous nous enverrez!

R. Rickwood (président, Conseil de rédaction)
A. Somerville
A. Worland
M. Goldstein

Restriction of the Right to Sue: Products' Liability and Workers' Compensation

H.P. Rolph*

In Ontario, as in most other Canadian provinces, the starting point for consideration of the liabilities and remedies that may arise where a worker is killed, injured or harmed in the course of employment is the *Workers' Compensation Act*, R.S.O. 1980, c. 539, as amended (the "Act"). In the employment field, Ontario and all other Canadian provinces have nationalized insurance and a form of no-fault system is deeply entrenched.

SCHEME OF THE ACT

Subject to certain very limited exceptions, most workers and most employers carrying on business in Ontario are covered by the Act. In Document No. 02-01-01 of the Employer Assessment Policies Manual, the Workers' Compensation Board estimates that 90 percent of Ontario workers are covered by the Act with 99 percent of the registered employers falling under Schedule 1.

Most employers in Ontario pay annual assessments to the Workers' Compensation Board (the "Board"), and are not individually liable to pay compensation to their workers. These employers are known as Schedule 1 employers and comprise most employers in Ontario. They pay an annual assessment based on the value of their payroll which is, in effect, a statutory insurance premium. The Board then pays compensation to those of their workers who are injured in the course of their employment or, where the worker is killed, to the worker's dependents, according to the scale established by the Act.

There is also a class of employers referred to as Schedule 2 employers who are individually liable to pay compensation to their workers according to the same scale as is provided under the Act. The Schedule 2 employers include municipalities, public utilities, library boards, the Ontario Government, and federal undertakings such as inter-provincial railways, airlines, and telephone companies. They are, in effect, self-insured, subject to their right to obtain private insurance to cover their liabilities under the Act, but still operate under the system administered by the Board.

Finally, there are a small class of employers known as Part II employers, including employers engaged in banking, insurance, broadcasting, haircutting, veterinary work, funeral directing, photography and taxidermy, who are outside the Act altogether and who can be sued in tort by their workers unless they have specifically applied for coverage under the Act. Sections 128 to 130 of the Act set out certain rules relating to such tort actions. While section 130(2) preserves the defendant employer's right to plead contributory negligence on the part of the worker, such common law defenses as voluntary assumption of risk and common employment, which relieved an employer of liability for injury caused to one of his employees by a fellow employee, have been removed.

RESTRICTIONS ON RIGHT TO SUE

The Act severely restricts the right of workers employed by Schedule 1 employers and dependents of those workers to sue civilly where the worker is injured or killed in the course of his or her employment. The basic thrust of the Act is to deny the worker employed by a Schedule 1 employer, or dependents of the worker, the right to sue either the worker's employer or any other Schedule 1 employer, or another worker employed by a Schedule 1 employer, in respect of an injury or industrial illness which is compensable under the Act. This important prohibition flows from a combined reading of sections 8(9) and 14 of the Act which provide:

> s. 8(9) *No employer in Schedule 1 and no worker of an employer in Schedule 1 or dependant of such worker* has a right of action for damages against *any employer in Schedule 1* or any *executive officer* or any director or any worker of such *employer*, for an injury for which benefits are payable under this Act, *where the workers of both employers were in the course of their employment at the time of the happening of the injury, but*, in any case where the Board is satisfied the accident giving rise to the injury was caused by the negligence of some other employer or employers in Schedule 1 or their workers, the Board may direct that the benefits awarded in any such case or a proportion of them shall be charged against the class or group to which such other employer or employers belong and to the accident cost record of such individual employer or employers. [emphasis added]
>
> s. 14 The provisions of this Part are in lieu of all rights and rights of action, statutory or otherwise, to which a worker or the members of his family are or may be entitled against the employer of such worker, or any executive officer thereof, for or by reason of any accident happening to him or any industrial disease contracted by him on or after the 1st day of January, 1915, while in the employment of such employer, and no action lies in respect thereof.

It can be quickly appreciated that section 8(9) applies in situations where workers of Schedule 1 employers are injured by reason of the negligence of their own

employer or one of their fellow employees or by the negligence of another Schedule 1 employer or its employee. It also can be readily seen that for section 8(9) to apply where more than one employer is potentially responsible, both the injured worker and some other worker contributing to the injury must have been acting in the course of their employment at the time of the happening of the injury.

Is Contemporaneity Necessary?

This requirement has given rise to a contentious issue of interpretation: must both workers be working at the actual time the accident or injury occurs, or is it sufficient if the injured worker was acting in the course of his employment at the time the injury was sustained, provided that the worker who was responsible for the injury was also acting in the course of his employment at the time his act causing the injury occurred? This is obviously an important consideration in a products' liability case where there will likely be an appreciable time lag between the occurrence of the negligent act and the occurrence of the damage caused by the negligence.

The first interpretation of section 8(9), which holds that the two workers must both be acting in the course of their employment at the time the accident occurs, is known as the "contemporaneity" interpretation. It enjoyed some favour prior to the 1984 amendments to the Act when the Board itself had exclusive jurisdiction to determine whether a worker or his dependant had the right to bring a civil action. It now appears to be falling into disfavour. In *Meyer and McDermott v. Waycon International Trucks Ltd., Rentway Canada Ltd. and W.C.B.* (1985), 15 O.A.C. 202 (Div. Ct., leave to appeal granted) Rosenberg J. rejected the "contemporaneity" interpretation of section 8(9), stating at pp.207-208, that:

> This alternate interpretation is completely consistent with the clear wording of the Act, since injury could mean both harm and wrong. The alternative interpretation is the only interpretation that is possible, since the interpretation referred to above as the "contemporaneity" interpretation makes no sense whatsoever. If the physical injury takes place even seconds after the negligence, this section would not apply under that interpretation. . . [T]he Board should have determined that the deceased and the workers of Waycon and Rentway were both in the course of their employment at the time of the happening of the injury, and that the action by all the plaintiffs, except Antonio Meyer and Gerry Meyer, the parents of the deceased Gerry Meyer Jr., is one the right to bring which has been taken away against the defendants under Part 1 of the *Workers' Compensation Act*.

It must be cautioned that this view of the proper interpretation put forward by Rosenberg J. did not represent the holding of the full court. Fitzpatrick J. dissented and held that the "contemporaneity" interpretation was the correct one, while Hollingworth J. simply held that the decision of the Board, the subject of the application for judicial review before the court, was not patently unreasonable, and on that ground alone he joined with Rosenberg J. in dismissing the application for judicial review. The judgment of the Divisional Court is under appeal and the issue cannot be regarded as settled until either the Court of Appeal or the Supreme Court of Canada rules on the matter.

In the interim, the Workers' Compensation Appeals Tribunal ("WCAT") which, pursuant to section 15 of the Act, is now adjudicating the issue of whether a worker's right of action is taken away by the Act, appears to be following Rosenberg J.'s interpretation of section 8(9). In *Decision No. 84*(*Cyanamid Canada Inc. v. Malier* dated November 12, 1986), WCAT followed Rosenberg J.'s interpretation of section 8(9) and held at p. 7:

> After reviewing the arguments made by Counsel, the decision of the Divisional Court in *Meyer*, and the history of the legislation and cases on this point, the Panel concludes that the focus in section 8(9) is primarily on the question: were these workers in the course of their employment at the relevant time given the particular circumstances of the injury alleged.

In the result, WCAT held that the worker's right of action was taken away against both his own employer and another Schedule 1 employer.

In this case, the worker alleged that his health had been adversely affected by exposure to chemicals. The worker was employed by a contractor who was engaged to do some excavation work for a chemical company. In the course of this excavation work, broken barrels containing chemicals were encountered. The worker alleged that exposure to these chemicals adversely affected his health, and he sued both his own employer and the chemical company. The chemical company relied on section 8(9) of the Act in support of its argument that it could not be sued civilly by the worker. WCAT accepted this argument and held that, since workers of Cyanamid would have buried chemicals in the course of their employment, section 8(9) came into operation notwithstanding that the actions of the chemical company's employees occurred prior to the date on which the worker was allegedly exposed to the harmful chemicals.

WCAT, however, did suggest that in some circumstances a long lapse of time between the happening of the negligent act and the occurrence of the ensuing damage might take the case outside section 8(9). This possibility emerges from the following passage at p. 8:

> On the facts of this case, the distance in time from the point at which the first step of the accident process occurred, (the burial of chemicals) and the final step, (exposure giving rise to the injury alleged) was a concern for the Panel. One can envisage extremely remote points in time, involving two workers of Schedule 1 employers, being raised as coming within section 8(9). Conceivably, this would create results and considerations as absurd and as irrelevant as the requirements for split second simultaneous involvement rejected by Mr. Justice Rosenberg in his reasons in *Meyer*. *Only by limiting the scope of the words by the intent and purpose of the workers' compensation scheme, can some middle ground be found between the extremes of the two interpretations. Until the section is clarified or changed by the Legislature, we can best give effect to the statutory intent by applying the section to the facts, keeping in mind the employment context generally addressed in the Act*. [emphasis added]

WCAT's view of the purpose of section 8(9) appears to be that it is directed at foreclosing civil actions by employees who are injured in the course of their employment as a result of negligence on the part of any other person employed by any Schedule 1 employer, including their own. This policy is clearly stated in *Decision No. 337* (*Delorey v. Digout*, dated August 29, 1986) where WCAT held that section 8(9) operated to bar a civil action where the employee suffering the injury and the employee causing the injury were employed by the same employer. WCAT stated at pp. 5-6:

> The scheme of the Act contemplates Schedule 1 employers paying into an accident fund. Schedule 1 workers who are entitled to receive Workers' Compensation benefits are paid out of the accident fund. In return, Schedule 1 workers and employers gave up their right to sue other Schedule 1 workers and employers provided that the workers involved in the accident were in the course of their employment when the injury occurred. There is nothing in the scheme of the Act to suggest that the right of action was to be given up only where the accident involved two employers. Indeed, the wording of section 8(11) would indicate that a Schedule 1 worker gave up his or her right to recover damages against *any* worker of *any* employer in Schedule 1. This, we suggest, is what the legislature intended in enacting section 8(9).
>
> In our view, section 8(9) was intended to take away a worker's right of action against other Schedule 1 workers and employers provided that the Schedule 1 workers involved in the accident were in the course of their employment.

Therefore, sections 8(9) and 14 will likely protect any Schedule 1 employer whose own worker is injured by some product used in its workplace against any civil action by the worker or his dependants.

Section 8(10) Limits Protection

Whether Section 8(9) also protects another Schedule 1 employer, which has produced or supplied the product that has caused injury to the worker, where one or more of its workers were involved in manufacturing or supplying the product causing injury, is not clear.

The right of a Schedule 1 employer to invoke section 8(9) as a defence to civil action by a worker who has been harmed by a product that it has manufactured or supplied is tempered by section 8(10) of the Act, which provides:

> Subsection 9 does not apply where the employer has supplied a *motor vehicle, machinery, or equipment* on a purchase or rental basis without also supplying workers to operate such *motor vehicle, machinery or equipment*. [emphasis added]

This provision, which has been interpreted in only one WCAT decision, and which does not appear to have been interpreted in any reported Ontario court decision, appears to remove the immunity to civil actions of a Schedule 1 employer who supplied a defective or dangerous vehicle, piece of machinery or equipment on a purchase or rental basis, provided that it does not also supply a worker to operate such vehicle, machinery or equipment. For example, if an automotive manufacturer supplied a truck manufactured in Ontario that contained defective brakes which subsequently failed while being operated by a worker in the course of his employment, the worker or his dependants would be able to sue the automotive manufacturer.

The scope of section 8(10), however, is restricted in that it is confined to "motor vehicle", "machinery" or "equipment". Schedule 1 employers who manufactured or supplied other hazardous or defective products that could not be characterized as either a "motor vehicle", "machinery" or "equipment" would be outside the scope of section 8(10). Accordingly, they could invoke the section 8(9) bar to civil actions by workers employed by other Schedule 1 employers who were injured by their products. For example, a chemical manufacturer who manufactured a toxic chemical might not be covered by section 8(10) because a chemical cannot easily be characterized as either "machinery" or "equipment". Indeed, in *Decision No. 84*, referred to above, the position of the chemical company that buried the chemical drums, which was granted immunity, is not that much different from that of the chemical manufacturer in this hypothetical example.

The wording of section 8(10), however, can have some curious results. In *Reshaping Workers'*

Compensation in Ontario, for example, Paul Weiler describes a case in Ontario where an Ontario-based soda pop manufacturer and bottler was able to invoke section 8(9) to stop a civil suit by a supermarket employee who was injured by the pop bottle when it exploded. An Ontario-based manufacturer, however, who produced a meat cutter with a defective guard that was sold to the same supermarket and resulted in the amputation of several fingers on a meat cutter's hand would probably be precluded by section 8(10) from raising section 8(9) as a bar to a civil action. It is very difficult to appreciate why there should be a distinction between the two situations if the soda pop manufacturer and bottler, and the meat saw manufacturer, are both Schedule 1 employers paying assessments to the Board.

In *Decision No. 725*, the one WCAT decision to date that has interpreted section 8(10), WCAT emphasized the distinction between a Schedule 1 employer who supplies both equipment and workers and a Schedule 1 employer who supplies only equipment. The former is immune to civil suit; the latter is not. WCAT stated at p. 8 of its decision:

> What is the rationale of section 8(10)? It draws a distinction between a situation where an employer merely supplies a vehicle and a situation in which that employer also supplies workers. If the employer also supplies workers section 14 and 8(9) apply and the employer is immune from suit for an injury for which benefits are payable under the Act, and he can be relieved of any portion of assessment which is otherwise liable to be charged against him. These things do not apply where the employer is merely supplying machinery. Without the essential element of the supply of a worker, who can be injured under the Act, section 8(9) does not apply. Why would this be? It seems clear that the reason is that the *Workers' Compensation Act* is a statute which provides for the compensation of injured workers. It does not provide for the resolution of disputes that relate only to the supply of equipment or a plan for financing automobiles through leasing. It is not a statute which concerns itself with property damage or questions of negligence in the provision of leased vehicles.

This statement of the policy underlying section 8(10) by WCAT suggests that it may be very loath to allow Schedule 1 employers to claim immunity under the Act to civil suits by employees of other Schedule 1 employers where the alleged negligence bears very little relationship to the discharge of its function as an employer. In other words, in products' liability actions, Schedule 1 employers being sued by individuals other than their own workers may not obtain immunity under the Act.

WCAT DETERMINES RIGHT TO SUE

Under the 1984 amendments to the Act, WCAT now has exclusive jurisdiction to determine whether Part 1 of the Act precludes a civil cause of action against any party to a civil action. This power was previously exercised by the Board itself but has now been transferred to WCAT. Any party to a civil action can now apply to WCAT for a ruling under section 15 of the Act which provides:

> Any party to an action may apply to the Appeals Tribunal for adjudication and determination of the question of the plaintiff's right to compensation under this Part, or as to whether the action is one the right to bring which is taken away by this Part, or whether the action is one in which the right to recover damages, contribution or indemnity is limited by this Part and such adjudication and determination is final and conclusive.

The exclusivity of WCAT's jurisdiction to make determinations under section 15 is further buttressed by the privative clauses contained in section 86g of the Act.

In *Mack Trucks Manufacturing Co. v. Forget et al.* (1973) 41 D.L.R. (3d) 421 (S.C.C.), *Re Mac's Milk Ltd. and Workmens' Compensation Board* (1977), 15 O.R. (2d) 508 (Div. Ct.) and *Ryan v. Workmen's Compensation Board, et al.* (1984), 6 O.A.C. 33 (Div. Ct.), the courts showed great deference to the decision of the Board in determining whether or not a cause of action was removed by the Act. In *Ryan v. Workmen's Compensation Board, supra*, the Divisional Court would not intervene because it found that the interpretation of certain provisions in the statute by one panel of the Board was not patently unreasonable, notwithstanding that a different panel of the Board had given an entirely different interpretation of the same provision. No less deference can be expected in respect of WCAT's decisions. This may be critical with respect to the interpretation of section 8(10) by WCAT because the Appeals Tribunal may be tempted to ameliorate the rather arbitrary application in products' liability actions of section 8(10) depending on the type of product supplied by giving a very expansive interpretation to the term "equipment". If great deference is shown to WCAT's interpretations of the Act by the courts in applications for judicial review, it will be very difficult to overturn decisions that give section 8(10) a very broad scope based on policy considerations.

ELECTION

Section 8(1) of the Act contemplates that there will be situations where a worker may either claim benefits under the Act or sue civilly. In the context of a products' liability action, the worker could sue the manufacturer and producer of a hazardous or defective product that had injured him if the

manufacturer or producer was not a Schedule 1 employer (which will be the case if it is located outside of Ontario), or was a Schedule 1 employer who has sold or leased a motor vehicle, a piece of machinery or equipment without supplying workers within the meaning of section 8(10). The former case is nicely illustrated by *Hobbs Manufacturing Co. v. Shields*, [1962] S.C.R. 716 where the widow of an Ontario worker who was electrocuted in the course of installing a machine successfully sued the Massachusetts-based manufacturer of the machine.

Under section 8(1) of the Act, where the worker or his dependants have the right to either accept compensation under the Act or sue civilly, they must elect between the two. In the event that the worker or his dependant recovers less in such an action than he would have been entitled to under the Act, the difference between the amount recovered in the action and the amount of compensation that would have been otherwise payable under the Act will be paid to the worker or his dependants (see section 8(2)). This will also apply to settlements if the Board approves the settlement *before* it is made (see section 8(3)).

If the worker or his dependant elect to claim compensation under the Act rather than to bring an action, the Board has a subrogated right to maintain the action on behalf of the worker or his dependant. In the case of Schedule 2 employers, who are individually liable to pay compensation, they are subrogated to the rights of the worker where he or his dependants elect to accept compensation. In the event that any such subrogated action brought by either the Board or a Schedule 2 employer recovers more than that paid to the worker or his dependants, the surplus after the deduction of costs is to be paid to the worker or the dependant (see section 8(4)).

MIXED DEFENDANTS

The Act also deals very specifically with those situations where there are a number of potential defendants, some of whom cannot be sued by reason of the prohibitions on civil actions contained in section 8. In actions where Schedule 1 employers or their executive officers or directors are rendered immune to civil suit by section 8(9), their proportional share of the loss or damage caused must be calculated and deducted from any judgment against any party not protected by the Act and no claim for contribution or indemnity can be made against them. This protection is conferred by section 8(11) which provides:

> In any action brought by a worker of an employer in Schedule 1 or dependant of such worker in any case within subsection (1) or maintained by the Board under subsection (4) and one or more of the persons found to be at fault or negligent is the employer of the worker in Schedule 1 or an executive officer or director thereof, or any other employer in Schedule 1, or an executive officer or director thereof, or any worker of any employer in Schedule 1, no damages, contribution or indemnity are recoverable for the portion of the loss or damage caused by the fault or negligence of such employer of the worker in Schedule 1 or an executive officer or director thereof, or of any other employer in Schedule 1 or executive officer or director thereof, or of any worker of any employer in Schedule 1, and the portion of the loss or damage so caused by the fault or negligence of the employer of the worker in Schedule 1 or an executive officer or director thereof, or of any other employer in Schedule 1 or an executive officer of director thereof, or of the worker of any employer in Schedule 1,shall be determined although such employer or executive officer or director or worker is not a party to the action.

Section 8(12) provides a similar protection for Schedule 2 employers and their executive officers and directors in suits by their own employees only.

In *DiCarlo v. DiSimone et al.* (1982), 39 O.R. (2d) 445, Mr. Justice Osler held that section 8(11) of the Act overrode provisions of the *Negligence Act*, R.S.O. 1980, c. 315, relating to the rights of contribution and indemnity between joint and several tortfeasors. Accordingly, in any contemplated products' liability action by a worker or his dependant, account will have to be taken of the impact of either section 8(11), in the case of a Schedule 1 employer, or section 8(12), in the case of a Schedule 2 employer, on the anticipated award of damages. If the employer of the plaintiff worker is protected against civil suit by the Act and bears a high degree of responsibility for the injury, the action against a manufacturer or supplier not protected by the Act may not recover very much for the worker, as the manufacturer or supplier will only be liable for its proportionate share of the loss.

AVOIDING THE ACT'S PROHIBITIONS ON CIVIL CAUSES OF ACTION

In recent years, there have been an increasing number of attempts to avoid the Act's prohibitions on civil actions. This is undoubtedly due to the perception that the quantum of any damage award in a civil action will greatly exceed the amount of compensation available under the Act.

Executive Officers

The Act's definition of the term "worker" provides one avenue by which to find a defendant to be unprotected by the Act. The term "worker" was and is expressly defined not to include "an executive officer of a corporation" (see section 1(1)(z)). In *Berger v. Willowdale A.M.C. et al.* (1983), 41 O.R. (2d) 89, the Ontario Court of Appeal held that a worker, who was injured when she slipped and fell on an icy sidewalk

leading from the building where she was employed, was entitled to sue the president of the corporation employing her, notwithstanding that the corporation itself was a Schedule 1 employer. The Court of Appeal held that since the president of the corporation was "an executive officer" and as such expressly excluded from the definition of "worker", he could be sued. The Court of Appeal rejected the policy argument that the president should be treated in the same way as his company by holding that the Legislature's explicit exception of executive officers from the definition of "worker" indicated that the Legislature was of the view that such officers should be exposed to tort actions if they were negligent in relation to their employees.

This judgement has been effectively overruled by the 1984 amendments to the Act (see S.O. 1984 c. 58, s. 5(2)), which extended the protections given to Schedule 1 employers to the executive officers of such employers.

A direct challenge to the Act came in *Ryan v. Westinghouse Canada Inc., et al.* (1984), 6 O.A.C. 33 (Div. Ct.). The plaintiff had been employed by Westinghouse Canada Inc., a Schedule 1 employer. In 1979, he was blinded when a can of what was believed to be cleaning fluid exploded while he was carrying it. The circumstantial evidence indicated that toluol was contained in the fluid and caused the explosion. Ryan sued Westinghouse, its president, several managers, and P.P.G. Industries Ltd., the manufacturer and distributor of the chemical. A companion action was brought against Westinghouse and two of its employees for a tort based on a breach of the *Occupational Health and Safety Act*.

The Board, which at the time had the final jurisdiction to determine whether a worker's right of action was taken away by the Act, held that Ryan could not proceed with the action. Westinghouse was a Schedule 1 employer and clearly was protected by the Act. The managers were held not to be executive officers and were therefore workers who, as such, could not be sued, which left only the president in an exposed position as an executive officer, not included in the definition of "worker". The Board, in what was clearly a policy-laden decision, held that the president was himself an "employer" and as such could not be sued. In effect, the Board held that there were two employers of Ryan, namely, Westinghouse Canada Inc. and its president.

This decision by the Board was challenged by way of application for judicial review. The Divisional Court dismissed the application on the ground that the Board had exclusive jurisdiction to determine who was an executive officer and who was an employer. Provided the Board's decision was not patently unreasonable, the court would not interfere in an application for judicial review. The court was not prepared to hold that the Board's interpretation of the term "employer" was patently unreasonable.

Occupational Health and Safety Act

The court in *Ryan* also held that a breach of Ontario's *Occupational Health and Safety Act* did not give rise to an independent tort action based on breach of statutory duty. The court held that the *Occupational Health and Safety Act* created a comprehensive administrative and adjudicative structure for the enforcement of the rights created by that Act, and, accordingly, that a breach of the Act could not give rise to a civil cause of action. In taking this approach, the court followed the Supreme Court of Canada's decision in *The Board of Governors of the Seneca College of Applied Arts v. Bhadauria*, [1981] 2 S.C.R. 181, which held that the Ontario Human Rights Code (the "Code") contained the exclusive mechanism for remedying losses caused by discriminatory acts and thereby precluded any enforcement of the Code by civil action.

Ryan v. Westinghouse Canada Inc., supra, is significant, however, because there was a line of English cases that had held that a breach of the *Factories Act*, which is the equivalent to Ontario's *Occupational Health and Safety Act*, would give rise to a civil tort action. This line of cases had not been explicitly rejected by the Supreme Court of Canada in *The Queen in Right of Canada v. Saskatchewan Wheat Pool* (1983), 143 D.L.R. (3d) 9, when the court had held that there was no independent tort based strictly on the breach of a statutory duty in Canada, but, rather, that the duty imposed by a statute might in some circumstances afford evidence in a general negligence action of a reasonable standard of care.

Family Law Act

Another approach taken to circumvent the effect of the Act where a worker has been killed was to bring a wrongful death action under s. 60 of the *Family Law Reform Act*, R.S.O. 1980, c. 152 (now s. 61 of the *Family Law Act*, S.O. 1986, c. 4 as am.). Section 60(1) of the *Family Law Reform Act*, which is almost identical in wording to section 61 of the new Act, provided that:

> Where a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, his spouse, as defined in Part II, children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.

In *Re Butler Trucking Co., et al. and Brydges, et al.* (1984), 46 O.R. (2d) 686, the Divisional Court held that where the deceased person upon whose death the action was based would have been restricted to obtaining Workers' Compensation under the Act, a

section 60(1) action under the *Family Law Reform Act* did not lie. The court held at p. 689:

> In our opinion, the right of action of the parents, brother and sister of the deceased person under s. 60 of the *Family Law Reform Act* is purely a derivative action depending on the entitlement of the deceased to personally maintain an action for damages in the circumstances of the accident if he had not been killed. . . .
> In our opinion, the respondent as plaintiff in the Supreme Court action could not maintain an action on behalf of the members of the family as an independent action for damages under s. 60 of the *Family Law Reform Act* because the deceased worker would not have been entitled to recover damages had he survived, his right of action against the applicants having been taken away by s. 8(9) of the *Workers' Compensation Act*.

This same view was endorsed by the Divisional Court in *Meyer and McDermott v. Waycon International Trucks Ltd., et al., supra*, which is now under appeal.

The Charter of Rights and Freedoms

Not surprisingly, lawyers have resorted to the Charter to attempt to avoid restrictions imposed by Workers' Compensation status on private tort actions. In Ontario, these efforts have not met with success. In *Re Terzian et al. and Workmens' Compensation Board* (1983), 148 D.L.R. (3d) 380, the Ontario Divisional Court held that the restrictions in the Act which precluded civil actions did not offend section 7 of the Charter which provides that:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The Divisional Court rejected an imaginative argument that the Act's restrictions on civil actions somehow affected the "security of the person" whose right of action was removed.

A different panel of Ontario's Divisional Court in *Ryan v. Westinghouse Canada Inc., supra*, rejected a similar argument based on section 7 of the Charter and relied upon *Re Terzian et al. and Workmens' Compensation Board, et al., supra*. *Re Terzian et al.* was also followed by Mr. Justice Power of the Alberta Court of Queen's Bench in *Re Budge and Workers' Compensation Board*, [1985] 1 W.W.R. 437, rev'd on other grounds 66 A.R. 13 (C.A.), where the court dismissed a challenge based on section 7 of the Charter to the provisions of the *Alberta Workers' Compensation Act* restricting civil rights of action.

But the proponents of curbing the restrictions of a Workers' Compensation statute on private rights of action won a major victory in *Piercey v. General Bakeries Ltd.; The Queen in Right of Newfoundland, et al., Intervenors* (1986), 31 D.L.R. (4th) 373, where Mr. Justice Hickman, Chief Justice of the Newfoundland Supreme Court, Trial Division, expressed the view that the provisions of Newfoundland's *Workers' Compensation Act*, 1983 curtailing civil rights of action were void and of no effect as being contrary to section 15 of the Charter and unjustifiable under section 1. In *Piercey*, the widow of a worker who was killed in the course of his employment sued her husband's employer. Her husband died on July 20, 1984, which was prior to April 17, 1985, the date on which section 15 of the Charter came into force. Mrs. Piercey's victory was a pyrrhic one in that Mr. Justice Hickman also held that section 15 of the Charter did not have any retrospective application, which meant that she could not invoke section 15 to invalidate the provisions in Newfoundland's *Workers' Compensation Act* prohibiting her from instituting her civil action, which arose prior to section 15 coming into operation.

Apparently, all counsel requested the judge to also rule on the substantive argument under section 15 as it would affect many other cases where there was no issue about the retrospective application of section 15. The Newfoundland Government has referred the judgment to the Newfoundland Court of Appeal, which was scheduled to hear argument on June 8, 1987.[1] The reference to the Court of Appeal was necessary because the defendants were successful — the tort action against them could not proceed so there was nothing for them to appeal.

The issue of whether section 15 of the Charter will invalidate the provisions in Workers' Compensation statutes precluding civil actions by workers and their dependants will probably reach the Supreme Court of Canada at some point. Section 15 has been raised in several cases in Ontario, but at the time of writing, none of these appear likely to result in a court judgement in the near future. Accordingly, at the time of this writing, the *Piercey v. General Bakeries* decision appears likely to emerge as the leading authority on the issue after it has been decided by the Newfoundland Court of Appeal, or perhaps the Supreme Court of Canada.

SUMMARY

In conclusion, one can make the following observations about the impact of Ontario's *Workers' Compensation Act* on civil actions brought by workers injured in the course of their employment or their dependants:

1. the Act will protect both Schedule 1 and 2 employers as well as their officers, directors, and workers against civil suits by their *own* workers or these workers' dependants. This protection will

[1] Editor's Note: The Newfoundland Court of Appeal, in a judgment dated June 11, 1987, held that the restrictions in ss. 32 and 34 of the *Workers' Compensation Act*, 1983, S.N. 1983, c. 48, are not inconsistent with s. 15(1) of the Charter.

extend to actions for contribution and indemnity by other defendants outside of the Act's protection;

2. the Act may protect Schedule 1 employers who have manufactured or supplied allegedly defective or hazardous products, as well as their officers, directors and workers, from suits by workers employed by other Schedule 1 employers or their dependants, depending on the interpretation of sections 8(9) and (10) of the Act;
3. the law regarding the proper interpretations of sections 8(9) and (10) of the Act is in a developmental state and cannot be regarded as settled;
4. the forthcoming judgment of the Court of Appeal in *Meyer and McDermott v. Workers' Compensation Board, supra,* will have important implications for the likely impact of the Act on Schedule 1 employers who are sued by workers employed by other Schedule 1 employers; and
5. section 15 of the Charter may invalidate the Act's restrictions on civil actions by workers or their dependants, but if it does, section 15 will call into question the validity of a countless array of statutes both in Ontario and other Canadian jurisdictions, and as a result will have a much greater impact than has been expected.

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Some Thoughts on Section 21 of the Workers' Compensation Act

*Thanasis Samaras

INTRODUCTION

Section 21 is of a particularly controversial nature. It is a section with great potential for abuse by employers and its application can be very detrimental to injured workers. The privacy of injured workers' lives is threatened. It is also a section that threatens the non-adversarial nature of workers' compensation. It gives the right to employers to request medical examinations of injured workers, performed by doctors *selected and paid for* by the employers. It raises the question of the role of "company doctors", "Board doctors" and independent specialists.

Before the changes of 1985 (Bill 101), Section 21 was worded as follows:

> 21. — (1) An employee who claims compensation or to whom compensation is payable under this Part shall, if so required by his employer, submit himself for examination by a legally qualified medical practitioner provided and paid for by the employer and shall, if so required by the Board, submit himself for examination by a medical referee.
>
> 21. — (2) An employee shall not be required at the request of his employer to submit himself for examination otherwise than in accordance with the regulations. R.S.O. 1980, c.539, s.21.

and the following was the policy on Section 21 developed by the Workers' Compensation Board:

> Section 21
> *Directive 1.* Where an employer requires a worker to submit for examination by a duly qualified medical practitioner provided and paid for by the employer and the worker refuses to do so, there is nothing in the Act compelling the worker to submit for such examination.
>
> In the event that the employer advises the Board that the worker has refused such examination we should make arrangements for the worker to submit himself/herself for immediate examination at the Board or at the direction of the Board.
>
> June 11, 1969.

It is interesting to note that the Workers' Compensation Board has admitted that "there is nothing in the Act compelling the worker to submit for such examination". In any event, the Workers' Compensation Board has hardly ever used this policy and, as far as we know, employers had hardly ever requested such examinations except where a "company doctor" arrangement existed. The reason for this I believe will become more evident further along in this article.

At the time of the 1985 changes, Section 21 was initially repealed. However, it was later re-introduced with some changes. The job of administering this section fell on the Workers' Compensation Appeals Tribunal. As we see in the new section 21, the Workers' Compensation Appeals Tribunal is to hear and determine the application by an employer requesting a medical examination. Note that the Workers' Compensation Appeals Tribunal has the power to "make such further or other order as may be just". The section reads:

> 21. — (1) Subject to subsection (2), where an employer so requires, a worker who has made a claim for compensation or to whom compensation is payable under this Act shall submit to a medical examination by a medical practitioner selected, and paid for, by the employer.
>
> 21. — (2) Where a worker objects to the requirement of the employer to submit to a medical examination or to the nature and extent of the medical examination, being conducted by a medical practitioner the worker or the employer may, within a period of fourteen days of the objection having been made, apply to the Appeals Tribunal to hear and determine the matter and the Appeals Tribunal may set aside the requirement or order the worker to submit to and undergo a medical examination by a medical practitioner or make such further or other order as may be just. 1984, c.58, s. 8, *part*.

The practice of the Workers' Compensation Appeals Tribunal, on a worker's objection to attending a medical examination requested by an employer, is set out in Practice Direction #2 as follows:

> When the letter of application is received from the employer, a date for hearing will be set and Notice of Hearing will be sent to the parties. The matter will then be reviewed and the parties will be contacted in an effort to informally mediate the dispute before the date set for hearing.
>
> Although neither the worker nor the employer is under any obligation to co-operate with the mediation process, this cooperation is encouraged. The Appeals Tribunal has found this process to be helpful, and has found that mediation can save the parties both time and money.

> If either party refuses to participate in mediation, or if mediation is unsuccessful, the matter will proceed to hearing upon the date set.
>
> Questions about this procedure may be directed to the Registrar of the Appeals Tribunal.
>
> Dated at Toronto, Ontario, this 9th day of July, 1986.

Note that after an application is received from the employer, the Workers' Compensation Appeals Tribunal encourages the parties "to informally mediate the dispute before the date set for hearing". This "informal mediation process" is tantamount to the Workers' Compensation Appeals Tribunal encouraging the worker to concede control over his/her medical care to the employer.

It is interesting that the controversy continues. The Toronto Caseworkers Group, in its brief to The Standing Committee on Resources Development (March, 1987), a recommended "that Section 21 be repealed", because "Section 21 represents a serious blow to the rights of injured workers and to the fairness of our compensation system". The same brief raises the question: "What is so 'fair' about sending a worker to a physician selected and paid for by the employer? We believe that he who pays the piper calls the tune." Out of the, up to now, eight, significant Workers' Compensation Appeals Tribunal decisions on Section 21 applications, we have dissenting, or dissenting in part, opinions in four of them. What I find even more interesting is that all four minority decisions come from panel members representative of workers.

IS THERE A NEED FOR SECTION 21?

According to Larson, paragraph 61.12(b):

> The perennial controversy on the "choice of doctor" question is the result of the necessity of balancing two desirable values. The first is the value of allowing an employee, as far as possible, to choose his own doctor. This value stems from the confidential nature of the doctor-patient relation, from the desirability of the patient's trusting the doctor, and from various other considerations. The other desirable value is that of achieving the maximum standards of rehabilitation by permitting the compensation system *to exercise continuous control of the nature and quality of medical services from the moment of injury*. (emphasis added)

and he concludes further down in the same paragraph 61.12(b) that:

> The compromise takes the form of having a panel of physicians maintained by the employer (thus satisfying the guarantee of necessary quality), with the employee having the right to make a selection from the panel (thus giving the employee at least some range of choice, although a limited one). The selection of the panel is not exclusively under the control of the employer, since the director may order necessary changes in its composition. Moreover, the first choice made by the employee is not absolutely conclusive, since he had a right to make another choice if he is not satisfied with the physician first selected. In addition, there are flexible provisions to take care of injuries away from the place of business, for the necessity to select specialists of a kind not on the panel, and so on.

It should be noted, though, that in the United States, according to Larson, paragraph 61.12(a):

> Under the commonest type of medical benefits clause, *the employer is required to furnish medical and hospital services* in the first instance. (emphasis added)

In Ontario, however, the Workers' Compensation Act in section 52 provides, in part, that:

> *Health Care*
> 52. — (1) Every worker who is entitled to compensation under this Part or who would have been so entitled had he been disabled beyond the day of the accident is entitled,
>
> (a) to such health care as may be necessary as a result of the injury;
>
> (b) to make the initial choice of doctor or other qualified practitioner for the purposes of this section;
>
> 52. — (2) In this Act, "health care" means medical, surgical, optometrical and dental aid, the aid of drugless practitioners under the *Drugless Practitioners Act*, the aid of chiropodists under the *Chiropody Act*, hospital and skilled nursing services, such artificial members and such appliances or apparatus as may be necessary as a result of the injury and the replacement or repair thereof when deemed necessary by the Board. R.S.O. 1980, c. 539, s. 52(2); 1984, c.58, s. 4, part.
>
> 52. — (4) Health care shall be furnished or arranged for by the Board or as it may direct or approve and,
>
> (a) in the industries in Schedule 1, shall be paid out of the accident fund and the necessary amount shall be included in the assessments levied upon the employers; and
>
> (b) in the industries in Schedule 2, the amount shall be paid by the employer of the injured worker to the Board for payment. R.S.O. 1980, c. 539, s. 52(4); 1982, c. 61, s.2; 1984, c.58, s.4, *part*.
>
> 52. — (6) *All questions as to the necessity, character and sufficiency of any health care furnished or to be furnished and as to payment for health care shall be*

determined by the Board. R.S.O. 1980, c.539, s. 52(6); 1984, c. 58, s.4, *part*. (emphasis added)

In other words, while in the United States it is usually the employer who furnishes the necessary medical services, in Ontario it is the Workers' Compensation Board's responsibility to furnish or arrange for care. Also, while in the United States the worker selects a physician from a panel of physicians maintained by the employer but not exclusively under the control of the employer (the worker has the right to make yet another choice if not satisfied by the first choice, and even to seek treatment by a specialist not on the panel), in Ontario the worker has the right to chose the treating doctors. Injured workers in Ontario will initially seek treatment from a general practitioner of their choice, but then will be referred to at least one *independent specialist without much choice*. The medical opinion of these independent specialists that treat injured workers should be sufficient for the adjudication of compensation claims.

Furthermore, in the United States, in the absence of an institution that furnishes or arranges for health care and administers workers' compensation claims, like the Workers' Compensation Board, the exercise of continuous control of the nature and quality of medical services is undertaken by the panel of physicians maintained by the employer. *In Ontario it is the Workers' Compensation Board that provides this quality control.* Subsection 52(6) quite clearly states that "All questions as to the necessity, character and sufficiency of any health care. . .shall be determined by the Board". It is the Workers' Compensation Board that has to be satisfied that "the necessity, character and sufficiency of any health care furnished" meets the required quality standards.

Under Section 75 the Workers' Compensation Board also:

> (1) . . .has exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part . . .
>
> (2) . . . such exclusive jurisdiction includes the power of determining, . . .
>
> (d) the existence of, and degree of, disability by reason of any injury;
>
> (e) the permanence of disability by reason of any injury; . . .
>
> (j) the question whether personal injury or death has been caused by accident; . . .
>
> (3) A worker who has made a claim for compensation or to whom compensation is payable under this Act shall, if requested by the Board, submit to a medical examination by a medical practitioner named by the Board.

In addition to this, Section 86h provides:

> 86h. — (1) The Lieutenant Governor in Council, after requesting and considering the views of representatives of employers, workers and physicians, shall appoint qualified medical practitioners, other than practitioners appointed under subsection 72(1) or 86b (3), to a list and the Appeals Tribunal may obtain the assistance of one or more of them in such way and at such time or times as it thinks fit so as to better enable it to determine any matter of fact in question in any application, appeal or proceeding.

What we see in these sections is "the exercise of continuous control of the nature and quality of medical services from the moment of injury" by the Workers' Compensation Board and the Workers' Compensation Appeals Tribunal. Workers' Compensation Board-employed doctors, who have been accused by injured workers of unfairness over the past several years, still play a role in this quality control exercise.

The Workers' Compensation Board has also been accused of ignoring the opinions of independent specialists and giving preference to the opinions of Board doctors. In his remarks to the Select Committee on the Ombudsman, on September 6, 1984, Dr. Daniel G. Hill stated:

> One of the problems I have identified is reluctance on the part of the Appeal Board to accept expert independent medical evidence above the evidence of the Board's own Medical Consultants. As you will see in Detailed Summaries numbers 16 and 17, the weight of independent medical evidence strongly supports the allowance of these claims. The Board, however, has chosen to accept the opinion of its own Consultants and thereby deny the claims. I am not suggesting that the Board should ignore the evidence of its Consultants, but when confronted with conflicting strong evidence from independent practitioners with specific expertise, the Board should be willing to accept this evidence. In the cases referred to, the weight of the evidence supporting the complaints is, in my view, so great that it goes beyond the policy of benefit of doubt.

In the Twelfth Annual Report of the Ombudsman for the period April 1, 1984 to March 31, 1985, it is stated about the same problem:

> Again this year, many of the complaints against the Workers' Compensation Board involve a conflict over medical evidence. The treating physicians are of one view and the Board's physicians hold a conflicting view. In the cases that come before me, more often than not the Board accepted the opinion of its physicians regardless of whether the worker's doctors are specialists or recognized experts in the relevant field of medicine. Because precedence is given to the opinions of Board medical staff, the doctors have been placed in the role of decision-makers. Clearly, it is the responsibility of Adjudicators and Commissioners to weigh and evaluate all the

> evidence before them without giving preference to the opinions of Board doctors. It is then the responsibility of Adjudicators and Commissioners to provide to the injured worker clear reasons for their preference for one medical opinion over another. These reasons may include the qualifications of the doctors, and the accuracy and thoroughness of medical reports. I would urge the Board to take steps to ensure that the appropriate reasons are given in all cases.

Furthermore, to suspect qualified practitioners of being "benevolent advocates" of workers is nonsense and an insult to the medical community. We rely most on the opinions of qualified independent specialists who treat injured workers over a period of time. A medical examination performed by a doctor selected and paid for by the employer is not going to be of any significance in a compensation case. Employers, being able to pay as much as they wish for a medical report, have an advantage over workers whose funds are limited.

Section 21 makes the erroneous assumption that since the Province's specialists and Board doctors are so "biased" in favour of injured workers, employers must have recourse to "their own" doctors to balance things out.

We have to preserve the non-adversarial two party nature of workers' compensation. The Workers' Compensation Board is intended to remove polarization between workers and employers in matters relating to disabilities arising from employment.

In my opinion, the Workers' Compensation Board exceeds the necessary quality control. Employers can direct their questions or objections directly to the Workers' Compensation Board. This is probably why employers hardly felt the need to use "old" Section 21 in 40 years!

There is, therefore, no need for Section 21.

THE WORKERS' COMPENSATION APPEALS TRIBUNAL TEST ON SECTION 21 APPLICATIONS

The Workers' Compensation Appeals Tribunal, in dealing with Section 21 applications, came up with a test. This test, however, should be further developed. There are enough objections made by injured workers' representatives and panel members representative of workers to justify the improvement of the test. The philosophy and traditions of the compensation system in Ontario, as well as the Workers' Compensation Act *as a whole*, have to be seriously considered by the Workers' Compensation Appeals Tribunal when designing a new test. The test as it stands leaves such a hole that, as an injured workers' representative put it, "a truck can go through".

In *Decision No. 174*, the Workers' Compensation Appeals Tribunal came up with the following test:

> *In all the circumstances, is the medical examination important to the achievement of a valid employer's compensation goal?*

Once this test is met by the employer, the application is to be granted.

In coming up with this test, the Workers' Compensation Appeals Tribunal made reference to the Hansard debates at the time that Section 21 was reintroduced. Specifically, the then Minister of Labour, the Honourable Mr. Ramsay, stated that:

> There may be cases where it is *reasonable* for an employer to wish to satisfy himself about the medical condition of a worker. (emphasis added)

The request for such a medical examination, according to the minister, has to be *reasonable*. The reasonableness of the request has to be determined according to the philosophy of the Ontario workers' compensation system as a whole. The Workers' Compensation Board and the Workers' Compensation Appeals Tribunal have ample investigative resources to gather the medical documentation necessary to adjudicate a claim. Surely, to be *reasonable*, the employer has to demonstrate that the Workers' Compensation Board or the Workers' Compensation Appeals Tribunal is lacking medical information which is necessary to properly adjudicate the claim. The employer should also have to show that the missing medical information will be obtained by the proposed medical examination.

A valid compensation goal has been defined as any cost control measure exercised by employers. On page 6 of *Decision 174* the Workers' Compensation Appeals Tribunal states: "If the worker is currently receiving workers' compensation benefits and the employer questions the worker's medical condition, the employer's compensation goal may be to satisfy itself as to whether the Board has good reason to continue compensation benefits". With such a broad definition, no application could fail to be accepted. Every application, by its nature, is targeting the employer's compensation costs and is, therefore, a valid compensation goal. This has resulted in the employers' representatives seeing Section 21 as the employer's best defence against compensation costs.

The Workers' Compensation Appeals Tribunal must further consider whether the examination requested by the employer *is important* to the achievement of that goal (not *necessary* but *important*). The medical examination requested can be considered important by the Workers' Compensation Appeals Tribunal simply because the employer seeks an examination to determine whether the worker has a certain condition and to compare the findings of its own practitioner with the findings of practitioners who have assessed the worker for a permanent disability pension. In *Decision 434* the employer was seeking a "second opinion" with which to compare the findings of the

Workers' Compensation Board physician who had assessed the worker's pension level. The worker was originally injured in February 1959. He was first granted a pension in April 1978. In June 1982, surgery was performed, and in December 1984, the current pension was granted on the basis that the worker's condition had deteriorated. The Workers' Compensation Appeals Tribunal was satisfied that the examination requested by the employer was *important* to the achievement of its goal with respect to the appeal of the worker's pension level.

Such a test would not leave much room for the worker to argue against submitting to a medical examination ordered by the employer. Once the Workers' Compensation Appeals Tribunal is satisfied that the employer's application passes the above test, "the worker will be required to undergo the medical examination unless the worker establishes a *unique circumstance* in his or her case which renders the request unreasonable" (*Decision 174*). What we see here is a shift of the onus to the worker to prove the unreasonableness of the application. It is accepted by the Workers' Compensation Appeals Tribunal that once the employer passes the test, the request is a reasonable one; the worker, on the other hand, has to pass a more stringent test to prove the unreasonableness of the request — that of the unique circumstances. One should not forget that it is the employer's application and that the onus should be heavily on the employer's side to prove the unique circumstances that warrant such intrusion into the privacy and dignity of a worker.

In *Minority Decision 174* it is proposed that the test be amended to include a provision that an application be allowed only if the concerns of the employer "cannot be adequately answered by means of the powers of the Board and the Tribunal in their investigative and adjudicative capacity". In *Minority Decision 434* it is proposed that the following be the test, instead:

> Has the employer demonstrated that the Board/Tribunal will require additional medical information to properly adjudicate the claim and will that information be obtained by the proposed medical examination?

The spirit of both proposals is the same. An amended test in the same spirit will certainly make much more sense, given the adjudicative powers and responsibilities of the Workers' Compensation Board and the Workers' Compensation Appeals Tribunal within the context of the workers' compensation system generally. In my view, until Section 21 is actually repealed, a test along the lines of Minority *Decisions 174* and *434* is more appropriate, and the Workers' Compensation Appeals Tribunal should therefore adopt it.

THE 14 DAY TIME LIMIT

Section 21 states that ". . .the employer may, within a period of fourteen days of the objection having been made, apply to the Appeals Tribunal to hear and determine the matter . . ." Note that the 14 day limit, as set out in the Act, is not discretionary.

One of the necessary procedural criteria as defined in *Decision 174* that has to be met by the employer is that the application to the Appeals Tribunal has been made within a period of 14 days of the objection.

This is quite clear. However, what happens if the employer misses the 14 day limit and proceeds with a fresh application on the 15th day? In *Decision 626* the Workers' Compensation Appeals Tribunal concludes that it "is under an obligation to decide each case on its real merits and justice" and that it should be, therefore, "considering the reasons for the employer's request and the reasons for the worker's objection". In other words, the Workers' Compensation Appeals Tribunal decided to apply the very same test as with every other application!

In the case that led to *Decision 626*, the worker had been examined already by at least two specialists (referred to one of them by the Workers' Compensation Board), and had had two pensions assessments (the second one, in fact, increasing the worker's permanent disability award). The Workers' Compensation Board, in a letter signed by the Hearings Officer, was of the opinion that "it has been fully accepted by the Workers' Compensation Board that the injured worker suffered a disc protrusion as a result of the compensable accident, and that continuing medical reports supported the ongoing disability which resulted in a permanent partial disability award". The employer had missed the 14 day limit on *three* occasions. It was argued that the fresh application had to be considered as essentially a continuation of the previous applications, and therefore, if allowed, it would defeat the purpose of the legislation setting the 14 day limit.

In *Minority Decision 626*, it is stated that if an additional test is not applied first:

> but instead the Panel considers why the employer missed the time limits, who is prejudiced by how much and whether the medical examination is important to the achievement of a valid compensation goal, then the Panel in fact is exercising discretionary powers of granting relief from missed mandatory procedural requirements. . . . To decide a second application without applying this first test can result in nullifying the 14 day protection provided in Section 21 and totally defeat the purpose of the time limit.

The Minority Decision, furthermore, defines the first test that should be applied as follows:

> Is the purpose of the second application primarily to correct the procedural problems caused by failing to comply with the time limits on the previous applications?

and goes ahead to further state that "Only if the answer to this first test is in the negative should the Panel proceed to decide the case on the merits of the request for the examination".

The Workers' Compensation Appeals Tribunal, in *Decision 626*, by considering the reasons for the employer's *fourth* request, was in fact extending the mandatory time limit. The purpose of the non-discretionary time limit, set out in the Act, was defeated, because the additional test proposed in *Minority Decision 626* was not applied. This additional test should be adopted immediately.

CONCLUSION

Section 21 does not fit the Workers' Compensation Act. It is a section that has to be repealed since it creates more problems than it solves. The Workers' Compensation Board and the Workers' Compensation Appeals Tribunal have more than enough investigative powers to satisfy even the most conservative employers. The quality of the health care furnished or arranged for by the Board, is determined by the same institution and, through the years, has satisfied the most demanding employers. This was recognized at the time of the review and reshaping of the compensation system in Ontario that led to Bill 101, and the section was initially repealed. The Panel of Medical Practitioners was introduced with subsection 86h. Section 21 was subsequently reinstated because of the lobbying of some employers' representatives.

The Workers' Compensation Appeals Tribunal, until this section is actually repealed, has to review and reconsider its approach.

The Workers' Compensation Appeals Tribunal should come up with a test that makes more sense and does not threaten the nature and philosophy of the compensation system in Ontario.

Furthermore, the Workers' Compensation Appeals Tribunal should strictly apply the 14 day mandatory time limit. Applications that intend to defeat the purpose of this time limit should not be heard.

Finally, the Workers' Compensation Appeals Tribunal should not encourage any mediation process.

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The Introduction of Workers' Compensation Legislation in Ontario

Nick McCombie*

This article is adapted from Chapter 1 of the book, **Workers' Compensation in Ontario,** *by G. Dee, N. McCombie and G. Newhouse, due for publication by Butterworths in the fall of 1987.*

> It is felt, and very properly, that in many cases the imperfect protection afforded to workmen is simply a question of money, and there is no reason why the employer's profit should prevail against the employees' injury. — *Editorial,* Toronto *Globe,* February 25, 1986.

A number of WCAT decisions, in attempting to interpret a specific section of the *Workers' Compensation Act*, have looked at Legislative history for assistance in determining the "intent of the Legislature." If a party is unhappy with a particular decision, it may well be that the perceived injustice arises from the Ontario Legislature's response to particular social and political pressures at the time the section was passed. An understanding of the forces that were brought to bear is, therefore, often critical in criticizing — or supporting — a particular element of workers' compensation. So too, with the system as a whole, it is important to understand the historic rationale for the introduction of legislation which has remained remarkably unchanged for over 70 years.

BACKGROUND

In modern times, the pressure to compensate workers who have suffered injury or disease by virtue of their employment has come from two main sources: social insurance principles and a replacement for common law right of action. In continental Europe, the source was more the former, while in Great Britain, the United States and Canada, the latter was a far greater influence on the development of workers' compensation statutes.

Workers' compensation had its first modern incarnation in Imperial Germany in the 1880's. In an attempt to undermine the influence of a growing socialist movement, the German Reichstag under Chancellor Otto von Bismarck passed a variety of measures designed to forestall the growing popularity of the political program of the Social Democrats. Among these pieces of social legislation was a compulsory, state-run accident fund. The money for this fund was to come from workers and employers.

In Britain, workers' compensation developed more as a response to the very real impediments that had arisen to block attempts by workers to recover damages from their employers in common law actions. A series of court decisions in the early 19th century established potent defenses for employers being sued by their workers. These decisions resulted in three doctrines which were used to thwart claims successfully: contributory negligence, fellow servant/common employment, and assumption of risk.

Contributory Negligence

Under the doctrine of contributory negligence, established in *Butterfield v. Forrester* (1809), 11 East 60, 103 E.R. 926, a defendant employer could escape judgement if it could be established that the injured worker had contributed in any way at all to the mishap, even if such a contribution was minor.

Fellow Servant/Common Employment

In 1837, the case of *Priestly v. Fowler*, 3M & W1, 150 E.R. 1030 established that an employer was not responsible for accidents caused by a co-worker. It was, therefore, necessary that the employer be found directly culpable for the accident. Needless to say, most employers were not directly involved in the work process and were, therefore, exempt from action.

Assumption of Risk

The final hook that employers could hang their hats on was the doctrine that held that when a worker accepted a job, he or she understood that there were certain inherent risks entailed therein. So a miner, for example, should assume that the job he was performing might well entail the risk of cave-ins. And, having assumed that risk at the outset of the job, he should have made his own financial arrangements for himself and his family in case an accident occurred.

The three defenses in this "unholy trinity" combined with the costs of litigation, prohibitive for most 19th century workers, to ensure that very few work-related disabilities were compensated.

The first attempts to deal with these problems were undertaken in 1880 in Britain with the *Employers' Liability Act*, 43 and 44 Vict., C.42, and in 1886 in Ontario with the *Workmen's Compensation for Injuries Act*, S.O. 1886. These laws attempted to ameliorate the worst aspects of the "unholy trinity" for plaintiffs bringing action. However, while they reduced the defenses available to the employer, they maintained financial limits on employer liability, placed time limits on bringing actions, and severely limited the amount of damages recoverable. These Acts, then, were essentially Employer Liability Acts, rather than Workers' Compensation Acts. From the employers point of view, on the other hand, these Acts opened

the door for an increased chance of lawsuit, and those few suits that were successful often resulted in an unexpected expense which could result in bankruptcy.

But, more importantly, there was in the early years of the 20th century increased public pressure to revamp totally the system by which injured workers could recover damages for work-related disabilities. In 1912, for example, American observer F.H. Bohlen remarked in *A Problem in the Drafting of Workmen's Compensation Acts*, (1912) 25 Harvard Law Review:

> Within the last few years, particularly within the last two, there has been a complete change in the attitude of public opinion. There are now in force in no fewer than ten states acts by which the owner of a business is made to bear a part of the loss resulting to his workmen from injuries received by them in his service, whether due to a defect in the conditions or operations of the business or not, or to insure his workmen at least partially against such loss. Nor has this movement spent its force: on the contrary, the impulse towards such legislation seems stronger than ever (page 328).

THE MEREDITH REPORT

The wave of reform indicated above did not leave Ontario unscathed. In 1910, Conservative Premier J.P. Whitney appointed the Chief Justice of Ontario, Sir William Ralph Meredith, to study workers' compensation schemes and make recommendations to his government.

It should be noted that Meredith's appointment was not the first attempt by Ontario to study a comprehensive workers' compensation scheme. Of particular interest is *A Report on Workmen's Compensation for Injuries*, Ontario Sessional Papers, 1900, #48, page 47 prepared by James Mavor, a Professor of Political Economy and Constitutional History at the University of Toronto. After reviewing legislation in various European countries — particularly the recently passed *Workmen's Compensation Act, 1887* in Great Britain — Mavor concluded that, given the generally smaller scale of business in Ontario:

> The effect of a *Workmen's Compensation Act* for Ontario if it were as it is in England, would, no doubt, be in the direction of throwing the whole cost of industrial accidents upon the particular industry — a tax upon management and partly no doubt upon labour. Only in certain cases could it be transferred to the consumers.

But in 1912, the time was right and Meredith himself had the necessary credentials and credibility. He was a former leader of the Conservative Party who had himself introduced an Employers' Liability Act in the Ontario Legislature in the 1880's while Leader of the Opposition. While it suffered the same fate as most opposition bills, it had prompted the government bill which resulted in the Workmen's Compensation for Injuries Act of 1886. And, as noted by C.W. Humphries in *Honest enough to be bold: the life and times of Sir James Pliny Whitney, (1985)*, Meredith was also responsible for recruiting Premier-to-be Whitney to run for the Tories and remained a major influence in Whitney's political life.

The rather verbose title of Meredith's study explains his mandate: *Laws Relating to the Liability of Employers to make Compensation to their Employees for Injuries received in the course of their employment which are in force in other countries*. It appeared in three versions: a *(First) Interim Report* outlining the submissions made by labour and business groups, Ontario Sessional Papers, 1912, #65; *A Second Interim Report with a Draft Act*, 1913, #85; and a *Final Report*, 1914, #53.

While Meredith was clearly a representative of the *status quo*, as might be expected of a former leader of the Conservative Party and a Chief Justice, his recommendations were far more sympathetic to labour's position than to that of business. In his final two reports he laid out the groundwork for a system of workers' compensation which has remained virtually intact until today.

No Fault

While Meredith is credited with establishing a "no fault" system, and while he rejected the Canadian Manufacturers' Association's (CMA) proposal that an injury due "wholly or principally to intoxication" or "intentionally caused by the workman" not be compensated, he did suggest that an accident solely attributable to serious and willful misconduct not be compensated unless such injury resulted in death or serious disablement, (*Final Report*, pages 12-13). Section 3(7) of the current Act incorporates this principle.

Administration

Despite the CMA's insistence that an agency set up by the state would be subject to partisan political pressure, Meredith declared that his system should be run by a Workmen's Compensation Board, appointed by the provincial government. Of more importance — given the subsequent developments in the United States — Meredith insisted that the appeal structure of the system should be removed entirely from the courts and remain internal to the Board. His rationale for this recommendation of the *Final Report* was that:

> A compensation law should, in my opinion, render it impossible for a wealthy employer to harass an employee by compelling him to litigate his claim in a court of law after he has established it to the satisfaction of a Board such as that which is to be constituted, and which will be probably quite as competent to reach a proper conclusion as to the matters involved, whether of fact or law, as a court of law (page 12).

Perhaps more pragmatically, he also pointed out at that "the transfer from the courts to the Board of the determination of claims for compensation. . .will lessen very much the cost of the administration of justice" (page 17).

Benefits

Meredith's recommendations on benefit levels and duration were a major victory for labour over the proposals of the CMA. Rejecting any time limitations, he stated that compensation:

> should continue to be paid as long as the disability caused by the accident lasts, and the amount of compensation should have relation to the earning power of the injured workman.
>
> To limit the period during which the compensation is to be paid regardless of the duration of the disability, as is done by the laws of some countries, is, in my opinion, not only inconsistent with the principle upon which a true compensation law is based, but unjust to the injured workman for the reason that if the disability continues beyond the prescribed period he will be left with his impaired earning power or, if he is totally disabled without any earning power at a time when his need of receiving compensation will presumably be greater than at the time he was injured, to become a burden upon his relatives or friends or upon the community (page 13).

This proved to be one of Meredith's major contributions. As is evident from A. Larson, *Workmen's Compensation Law* (New York: Matthew Bender, 1983, with updates), in most U.S. jurisdictions, "permanent" disability is judged to be a set number of weeks, according to the relevant schedule. A U.S. worker with a total, permanent disability would, therefore, only receive benefits for 400-600 weeks, depending upon the jurisdiction.

In addition to rejecting time limits, Meredith also insisted that compensation payments be tied to the individual worker's pre-accident earnings, rejecting the CMA's position which would have set a flat rate for all injured workers regardless of income. In so doing, Meredith envisioned that all wage earners' earnings would be covered by the Act. The concept of workers' compensation covering virtually all wage-earners earnings was, in fact, quietly abandoned at some point, so that Professor Weiler would write, in his 1980 report, *Reshaping Workers' Compensation for Ontario*, that "In practice the ceiling has been set at about 125% to 130% of average wages in the province . . . which will cover earnings through the 80th percentile of the provincial wage scale" (page 34).

Funding

The major battle between labour and business had been over who would fund the system. Once again, Meredith provided labour with reason to be pleased with his report. The concept of contributory premiums paid by workers and/or financing from government revenues was rejected. Instead, he recommended that the system be funded by way of a collective liability fund, by which employers would be placed in different rate groups, or classes, according to the nature of their business. All members of the class would pay the same assessment rates, based on a percentage of payroll, into the WCB accident fund. This system of funding is now universal across Canada, as opposed to many U.S. jurisdictions which allow for privately run, "self insurance".

"The History of Workers' Compensation in Manitoba", Chapter 3 in the *Report of the Workers' Compensation Review Committee*, (May 1987) provides an interesting historical footnote. It appears that the scheme in the province of Manitoba, between 1916 and 1920, used private insurance carriers until it became evident that more benefits could be paid to injured workers, with no increase — and possibly a decrease — in premiums charged to employers, if a collective liability, state-administered fund was used (pages 31-33).

Removal of Litigation Rights

The major trade-off for labour was that, for any accident to which the new Act applied, it removed the victim's right to a common law action. It was also provided, however, that in occupational accidents which were not covered by the Act, the "unholy trinity" of employer defenses would no longer apply.

MOTIVATION

Meredith's report was, by and large, an incredibly far-sighted document. Having investigated the laws in other jurisdictions and having heard from labour and business in Ontario, Meredith had no hesitation in stepping on the toes of some of the business community who had warned that his proposals would drive industry from the province. He did so, not because he was politically "radical" or "pro-worker". On the contrary, his views on socialism were well-known and were summed up in the transcript of his first report in which he said, "There are two kinds of socialists. There is a very bad kind, and another not quite so bad" (page 276).

It was rather his acute political awareness of the growing strength and resentment of the labour movement which seems to have motivated him. The concluding paragraph of his Final Report sums up this concern:

> In these days of social and industrial unrest it is, in my judgement, of the gravest importance to the community that every proved injustice to any section or class resulting from bad or unfair laws should be promptly removed by the enactment of remedial legislation and I do not doubt that the country whose Legislature is quick to discern and

> prompt to remove injustice will enjoy, and that deservedly, the blessing of industrial peace and freedom from social unrest. Half measures which mitigate but do not remove injustice are, in my judgement, to be avoided. That the existing law inflicts injustice on the workingman is admitted by all. From that injustice he had long suffered, and it would, in my judgement, be the gravest mistake if questions as to the scope and character of the proposed remedial legislation were to be determined, not by a consideration of what is just to the workingman, but of what is the least he can be put off with; or if the Legislature were to be deterred from passing a law designed to do full justice owing to groundless fears that disaster to the industries of the Province would follow from the enactment of it (pages 17-18).

POLITICAL PROCESS

Meanwhile, the necessary political process was not an easy one. As C.W. Humphries noted in his biography of Whitney:

> . . . Meredith's draft bill never proceeded to the floor of the legislature in the session of 1913, and angry labour leaders denounced the Whitney government for yielding to pressure from business interests in failing to act on the matter. In light of later developments, this charge seems to have some foundation (page 208).

On the other hand, a strong business lobby considered the Meredith *Draft Act*, in the words of Oshawa car maker R. McLaughlin, as quoted by Humphries, as "simply class legislation, and an attempt to place a heavy burden on Manufacturers which should be borne chiefly by the State" (pages 210-211).

Caught between the lobby of business interests and the pressure of labour and his old mentor, Meredith, Whitney continued to dither. Finally, in the spring of 1914, while Whitney was ill, acting Premier I.B. Lucas introduced the *Workers' Compensation Act* in the Ontario Legislature. On May 1, 1914, the Bill received royal assent, to come into force on January 1 of the following year.

CONCLUSION

Since that time, while there have been a number of Royal Commissions and Task Forces which have reviewed workers' compensation in Ontario, the basic structural framework and principles set out by Meredith have remained intact. It is for that reason that workers' compensation can be said to be a truly hybrid piece of legislation. As one which grew up out of and in reaction to common law remedies, and pre-dated by several decades other pieces of "social" legislation such as Unemployment Insurance, Old Age Pensions and Medicare, it does not have the hallmarks of "welfare state" type remedies. The concept of social responsibility for social problems was one which emerged much later. In contrast, workers' compensation maintains an essentially private relationship between worker and employer, albeit one which is mediated, and for all practical purposes administered, by an agency of the state — the Workers' Compensation Board.

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The Right to Sue Executive Officers

W. Augustus Richardson*

I believe that the decision of the Appeals Tribunal in *Decision No. 516 (Dietrich et al. v. Zimmer et al.)* was wrong.

The Tribunal, with respect, erred:

1. In believing that it was bound by the decision of the Ontario Court of Appeal in *Berger v. Willowdale A.M.C. et al.* (1983), 41 O.R. (2d) 89 to conclude that executive officers and directors were excluded from the protection against civil law suits otherwise afforded employers under the Act;
2. In its interpretation of the intent of Legislature in failing to make the 1984 amendment retroactive.

THE EFFECT OF BERGER

Berger does not and never has stood for the proposition that directors were excluded from the Act. All it decided was that there could be a duty of care owed by a director to an employee of his company. That issue was completely divorced from the issue of whether a director fell within the Act.

In *Berger*, the latter issue had already been disposed of, and was not before the Court of Appeal at all.

Consider the history of the action in *Berger*.

As appears from the decision of the Ontario Court of Appeal in *Berger*, there had been an application under section 15 of the Act by one of the parties to the Board for a decision as to "whether the action is one the right to bring which is taken away by" Part 1 of the Act: (s. 15).

The Board in the *Berger* case decided that the right of action against the director was not one which had been taken away by Part 1. That decision was "final and conclusive": (s. 15).

In other words, once that decision of the Board was made, it was no longer open to any party in the action to argue that the plaintiff's right of action had been taken away by the Act. It was no longer an issue.

The only remaining *legal* issue in the civil action which thereafter proceeded was whether or not a director of a company owed a duty of care to an employee of the company of which he was a director.

The Court of Appeal applying the time honoured principles set out in *Donoghue v. Stevenson*, [1932] A.C. 562 at 580, held that a director did owe a duty of care to an employee of a company of which he was a director.

But, the fact that *at common law* a director of a company may owe a duty of care to an employee of that company, had no bearing on any subsequent section 15 applications.

The Board is not bound to follow strict legal precedent (s.80(1)), and is free to reconsider its approach and come to a different conclusion. In other words, the Board could always determine on a subsequent section 15 application on similar facts, that a director *was* an "employer" within the meaning of the Act, and hence entitled to shelter behind the defence afforded by section 8(9). So long as such a decision was reasonable, a Court would not overturn it on judicial review (which is the effect of the decision of the Divisional Court in *Ryan v. Workmen's Compensation Board* (1984), 6 O.A.C. 33).

I appreciate that Mr. Justice Cory stated in passing at pp. 98-99 of the decision that "the exclusion of the executive officers of corporations from the definition of 'employee' in the Act maintains the right of an employee against such officers". I accept that passage suggests that His Lordship thought that executive officers were indeed excluded from the provisions of the Act.

However, with respect, I do not think that he really meant to say that.

The passage is buried in a long discussion on policy. And that discussion was part of the discussion concerning whether a common law duty of care should be imposed upon the defendant director.

In law, the decision as to whether a duty of care is to be imposed in a given situation always involves a consideration of two matters: proximity and whether there are any policy reasons negativing the imposition of a duty of care, notwithstanding the existence of proximity.

It must always be remembered that in negligence it is not sufficient simply to establish that there was proximity, in the sense of the "neighbour" test proposed by Lord Atkin in *Donoghue v. Stevenson*. For once the neighbour test is satisfied, the Court still has to determine whether or not there are any policy reasons that negative the imposition of a duty of care, notwithstanding the satisfaction of the neighbour test.

As was observed by Lord Wilberforce in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) at 751-52:

> . . .the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages: *First one has to ask whether*, as between the alleged wrong-doer and the person who has suffered damage *there is a sufficient relationship of proximity or neighbourhood* such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a prima facie duty of care arises. *Secondly, if the first question is*

> *answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to who it is owed or the damages to which a breach of it may give rise.* (emphasis added)

Hence, the observation of Cory, J.A., was more likely aimed at counsel's argument that the Court should not impose a duty of care because social policy, as evidenced by the Act, was against the imposition of such a duty. Mr. Justice Cory's response, *in effect*, was that the Act did not evidence such a social policy. Thus, there was no reason why the Court should refrain from imposing such a duty.

As well, His Lordship's comment was not a necessary element to the decision. Indeed, the earlier decision of the Board on the section 15 application rendered any comments by His Lordship on that subject moot.

DO OFFICERS AND DIRECTORS FALL WITHIN THE PROTECTION OF THE ACT?

Tribunal *Decision No. 516* deals at length with the meaning of the word "worker" under the Act.

Leaving aside the issue of the effect of the decision of the Court of Appeal in *Berger*, the Tribunal's reasoning appears to be as follows:

> (a)the definition of "worker" under the Act specifically excludes "an executive officer of a corporation";
> (b)when the Legislature in 1984 amended the Act so as to include from that day on, an executive officer or director within the protection afforded by the Act, it failed to make the provision retroactive. Hence, the Legislature must have believed that prior to the 1984 officers and directors were not within the Act.

Based on this reasoning, the Tribunal concludes that prior to 1984 an executive officer or director, not being a "worker" within the meaning of the Act, was not afforded any protection under the Act from a civil law suit.

I note in passing that the Tribunal reaches this decision with extreme reluctance. Indeed, on p. 7 of the decision, the Tribunal states that they would have interpreted the Act in such a way as to protect executive officers if it had not been bound by *Berger*.

Given the Tribunal's understanding of the policy underlying the Act (with which, with respect, I agree) it is unfortunate that the Tribunal concluded that executive officers or directors were excluded from the protection afforded by the Act.

Nor, with respect, do I believe that its reasoning in so concluding is unimpeachable.

In my view, there are two flaws with the Tribunal's reasoning.

First, it fails to consider the question of whether an executive officer or director might be included within the meaning of "employer" in the Act.

Secondly, it misinterpreted the effect of the 1984 amendment on the Act as it existed prior to that amendment.

EMPLOYER

The definition of "employer" in the Act is not exclusive. The definition provides that the word "employer" *includes* certain individuals and entities, but that list is not exhaustive.

In my view, it would have been open to the Tribunal to conclude that the word "employer" included an executive officer or director.

Such a definition would not in my view have been unreasonable.

The definition of "employer" in the Act certainly contemplates the inclusion of members of collective entities (i.e., the reference to permanent Tribunals or Commissions appointed by the Crown).

As well, the *Interpretation Act*, R.S.O. 1980, c. 219, s. 10 provides that:

> Every Act shall be deemed to be remedial. . . and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

Given the object of the Act as revealed by its underlying intent, purpose and rationale, it would in my view have been reasonable for the Tribunal to so interpret the word "employer" as to include executive officers and directors.

To do otherwise is to create an anomaly.

It would mean that all individual proprietorship would be included in the Act; but that once that proprietorship becomes incorporated, the officer, director, and sole shareholder, who remains the driving force of the corporate entity, is suddenly excluded from the protection afforded by the Act.

Yet, in terms of the social policies to be effected by the Act (in particular, the relationship between the "employer" and the worker, the right of the worker to receive compensation quickly, etc.), there is no reason to treat a sole proprietorship and a corporate officer differently.

Hence, it would not in my view have been unreasonable for the Tribunal to have arrived at an interpretation of the word "employer" that would include an executive officer or director. The Courts from time to time have recognized that a corporate entity for certain purposes, may simply be the alter ego of the officer, director and shareholder that animates it.

Indeed, the Divisional Court in *Ryan* upheld the decision of the Board that an executive officer or director *was* within the Act. In other words, the Court held that an interpretation of the pre-1984 Act that included an executive officer or director within the protection afforded by the Act was not so unreasonable as to require judicial intervention.

It is unfortunate that the Tribunal in *Decision No. 516* failed to take heed of the signal given to it by the Court.

EFFECT OF AMENDMENT

As noted above, the Tribunal appears to conclude that because the Legislature failed to make the amendment retroactive, that must have meant that the Legislature did not understand the pre-1984 executive officers or directors to have been covered by the Act.

The difficulty here is that such an approach is expressly forbidden by Act of the Legislature. Sections 17, 18 and 19 of the *Interpretation Act* provide as follows:

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.
18. The amendment of an Act shall be deemed not to be or to involve a declaration that the law under the Act was or was considered by the Legislature to have been different from the law as it has become under the Act as so amended.
19. The Legislature shall not, by re-enacting, revising, consolidating or amending an Act, be deemed to have adopted the construction that has by judicial decision or otherwise been placed upon the language used in the act or upon similar language.

The effect of the above-noted provisions of the *Interpretation Act* suggests that an equally appropriate approach is this: the Legislature always intended and understood the Act to include executive directors or officers; the decision of the Tribunal or the Court of Appeal in *Berger* suggests a possible misinterpretation; accordingly, so as to more clearly express the intent and will of the Legislature, the Act is amended to achieve that end; but the amendment does not in any way represent an acknowledgement that the view of the Board in *Berger* was a proper or correct rendering of the meaning and intent of the Act.

RETROACTIVITY

The long discussion of retroactivity in *Decision No. 516* is, with respect, beside the point.

It is, of course, quite true that legislation which affects the rights of individuals is not to be interpreted as having retroactive effect, unless such an intention is manifestly clear.

But in this case, that only begs the question of what were the "rights" of workers vis a vis executive officers and directors under the Act. That question was open, and had to be decided first.

The Board in *Berger* had decided that executive officers were subject to civil suit. The Board in *Ryan* decided that they were not. The Divisional Court in *Ryan* upheld the Board's right to so interpret the Act.

Accordingly, there was absolutely nothing in either the jurisprudence, or the intent of the legislature as evidenced by the 1984 amendment, which forced the Tribunal to decide the issue either way. Given the Tribunal's professed unhappiness at excluding executive officers from the Act, it is thus unfortunate that it felt that it was bound to make the decision that it did. It was not.

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Admissibility of Evidence and the Operation of the Three Week Rule: The Presumption of Irrelevance

L.A. Liversidge*

The Tribunal has tremendous power to determine appeal procedure and an equally extensive "discretionary" power to determine the admissibility of evidence and thereby direct the outcome of the appeal. Different limitations are imposed on the Tribunal's authority, in relation to these two distinct concerns.

Unfortunately, upon strict analysis of the operation of what is commonly referred to as the "three week rule", it would appear that this distinction is not recognized. This purely procedural rule appears to have been transformed in practice, into a general exclusionary rule of evidence. The transformation would appear to be in excess of the lawful authority of the Tribunal.

The Appeals Tribunal is referred to in legal circles as "a creature of statute", that is, the extent of power or authority to determine rights, or in this case, the privilege of workers to compensation under the *Workers' Compensation Act*, is derived from the legislation. The Tribunal has no "lawful" authority to exercise power over anyone, beyond that which has been awarded under the Act.

Under the Act, the Tribunal is neither bound to follow strict rules governing the admissibility of evidence, nor is it bound by the procedural provisions of the *Statutory Powers Procedure Act* R.S.O. 1980 c.484.

Under sections 80 and 81 of the *Workers' Compensation Act*, the Tribunal is "required" to determine the admissibility of evidence through the exercise of "discretion", to assure that the decision is based on the merits of the claim.

Section 80 is the most basic statement of principle upon which decisions with respect to the admissibility of evidence must be based:

> 80(1) Any decision of the Board shall be upon the real merits and justice of the case, and it is not bound to follow strict legal precedent but shall give full opportunity for a hearing.

A "determination on the real merits and justice of the case" presumes that admissible evidence speaks to the merits of the substantive claim, and therefore, by necessary implication, the Panel must review the evidence and determine whether it is relevant to the substantive issue or issues to be heard.

> Section 81 provides authority, only limited by the effect of section 80, 81(b) to accept such oral or written evidence as in its discretion it considers proper whether admissible in a court of law or not.

The legal concept of "discretion", requires the person authorized to hear the claim, to decide whether evidence will be accepted, on a case by case basis, without recourse to general rules. Discretion limits the Tribunal's power in that it precludes the establishment of "exclusionary rules" and allows only lawful authority to identify policy guidelines.

Basically, anything goes, within the bounds of reason and the context of the substantive claim.

The nature and extent of the Tribunal's lawful authority in relation to "process", is separate and distinct. The Tribunal has been awarded explicit power to make specific "rules" regarding the conduct of an appeal.

Under section 86k the Tribunal has authority to determine its own practice and procedure and may, subject to the approval of the Lieutenant Governor in Council, make rules governing its practice and procedure and the exercise of its powers in respect thereto, and may prescribe such forms as it considers necessary.

Procedure is essentially administration of a case load though it would be naive to believe that rules establishing the structure through which a claim to benefits is assessed, will not also influence the outcome.

Somewhere between the two distinct statutory powers resides the three week rule; proposed as a purely procedural rule, but used to exclude relevant evidence.

The precedents which have been identified and published by the Tribunal as "significant decisions", provide only limited information as to the application of the procedural aspect of this rule.

The precedents merely confirm that the three week rule requires that the materials upon which the party intends to rely, and the names of any witnesses that will be called, be submitted to Tribunal Counsel, at least three weeks prior to the hearing.

Reference must be had to the standard form covering letter to the Case Description which is supplied by Tribunal Counsel. The letter outlines this rule in greater detail and indicates that the only evidence that will be admitted at the hearing, is that which is contained the Case Description. Tribunal Counsel cautions:

> Please review this material carefully. If you think the Case Description is unclear or incomplete in any way, or if you object to any of the documents being seen by the Hearing Panel, or you wish to add other documents to the Case Description you should contact. . .(the assigned Tribunal

> Counsel). . .within the time limits. . .(three weeks prior to the hearing date). The final draft of the Case Description, and no other material, will be sent to the members of the Hearing Panel. . .two weeks prior to the hearing date.
>
> . . .Any evidence you intend to use at the hearing which is not already included in the Case Description, must be available to the Tribunal Counsel Office and to the other party. . .

If the three week limitation period is not met, something in the nature of a *voir dire* has been created:

> . . .Requests for changes to the Case Description received after this period will be withheld until the day of the hearing at which time the Hearing Panel will decide, after hearing representations, whether to accept the evidence. . .

It is therefore clear that the admissible evidence is defined as that which is contained in the Case Description. Any other evidence is deemed inadmissible by the operation of the procedural rule and excluded, unless the Panel accepts representations which attempt to justify the breach of the rule.

The three week rule has, therefore, developed in practice into a strict exclusionary rule of evidence.

The precedents do set out the policy behind the rule in a fairly comprehensive way.

Interim Decision No. 570, outlines the purpose of the rule, which is,

1. to prevent surprise at the hearing, as a result of the introduction of new documentary evidence or witnesses.
2. to ensure that all the parties will have opportunity to review the documents and prepare a response.
3. to ensure the opposing parties have opportunity to consider the kinds of questions they may wish to ask a witness.
4. to ensure "to the greatest extent possible", full pre-hearing disclosure of the issues, facts and evidence.
5. to prevent a party from being prejudiced at a hearing.

The precedents have also identified "exceptional circumstances" which may displace this presumption of inadmissibility.

Relevance, as will be seen, is only one factor to be weighed by the Panel. Therefore, there is potential for relevant evidence, necessary to determine the substantive issue, to be excluded.

One argument that can be put forward in an attempt to justify admission of relevant evidence, is that the principle of disclosure has been met through alternative means.

In *Decision No. 828*, the worker's representative sought to introduce three documents at the hearing which had not previously been included in the Case Description. The introduction of these documents at the hearing did not comply with the three week rule.

Notwithstanding the clear breach of the rule, the Panel allowed the documents to be introduced in evidence on the basis that all of the documents were well within the employer's knowledge and hence, the element of surprise was not present.

The evidence consisted of two letters, one written by the employer to the worker and the second written by the worker to the employer. The third document was a job description of a Hansard reporter.

The Panel also seemed to rely on the fact that the employer did not object to the admission of these documents.

It would appear therefore that it is prudent to assure the concurrence of the other party prior to the hearing.

In *Decision No. 828*, there is no indication that the employer was aware that the worker intended to use the three new documents. The Panel merely found that the employer would have been well aware of their existence.

On the basis of this decision, a party should be able to introduce any documentary evidence which would have been, technically, property of the company, without first advising the employer of the intention to use the documents. This is clearly inconsistent with the principle that both parties be fully advised of the case which they are expected to meet, three weeks prior to the hearing.

In circumstances when the credibility of a witness is at issue, or becomes an issue through the course of the hearing as testimony is offered, pre-hearing disclosure or the concurrence of the other party is moot and irrelevant.

In *Interim Decision No. 570*, to test the credibility of the witness during cross-questioning, one representative asked questions concerning information to be found in documents not previously produced, and not part of the Case Description.

The opposing party did not object and therefore, one must assume concurrence. Rather, in this case, the objection to the line of questioning was raised by Tribunal Counsel.

The representative, seeking to continue cross-questioning, argued that disclosure in advance would defeat the purpose of cross-questioning, that it was impossible to know precisely what a witness will say at the hearing and that it was, therefore, not possible to determine relevance comprehensively. Finally, the representative argued that automatic exclusion of evidence based on strict application of the three week rule, precluded a party from disproving new evidence presently in the form or oral testimony, at the hearing.

The Panel resolved that the "paramount objective is to get the right answer on the entitlement question". With this purpose in mind, the "exceptional circumstances" which would be considered in the application of discretion to admit evidence, sought to

be introduced in breach of the three week rule, were identified as follows:

1. The relevance of the documents to an issue in dispute.
2. Whether the other party opposes the introduction of the documents.
3. Whether, in the Panel's opinion, the other party will be prejudiced by the introduction of the documents at the hearing.
4. The extent to which the contents of the document lie within the current knowledge of the other party.
5. The reasons for not providing the evidence within the time limit required by the rule.

While not an exhaustive list, it is clear that relevance is only one factor to be considered. It would also appear that in order to determine if these pre-conditions have been met, the Hearing Panel would have to consider the content and context of the evidence sought to be admitted.

The analysis proposed by the Hearing Panel in that decision is a prime example of the lawful exercise of discretionary power, except that the discretion is only applied after evidence has been excluded on the basis of a strict, general "rule".

Again, a distinction must be made between admissibility and weight. By the operation of the three week rule, in combination with the role of Tribunal Counsel, certain documents are deemed admissible. There is no indication that the Tribunal reviews and determines the admissibility of the evidence that is included in the Case Description by Tribunal Counsel, or included at the request of a party. While the panel may not have regard for much of the evidence in the Case Description, submitted two weeks before the hearing, this is a matter of assessing the weight of evidence. At least the evidence is before the Panel.

If the relevance of documents has never been addressed in an open hearing, the integrity of the process suffers. It is not possible to know whether the evidence heard was sufficient to lead to the truth.

The Tribunal acknowledges that there is no lawful authority under the Act, to rely solely on the judgement of Tribunal Counsel in preparing the Case Description that all relevant evidence is before the Panel. To do so would be to shift the burden of responsibility for deciding what is relevant, and ultimately, what decision should be made on the basis of the evidence.

Unfortunately, no distinction appears to be made between admissibility and weight, and evidence not included in the Case Description, by Tribunal Counsel, is presumed to be inadmissible and must therefore be presumed to be irrelevant.

Similarly, the parties in the proceeding, who are expected to present the appeal, do not appear to have any independent control over their own preparations.

In *Decision No. 828*, the panel gave consideration to the position of the opposing party but retained discretion to exclude the evidence. The fact of agreement between the parties, to the inclusion of the evidence did not determine the issue. Rather, this was only one factor taken into account by the Tribunal in determining admissibility.

If both parties are prepared and willing to address the relevant evidence, exclusion merely on the basis that the three week rule does not achieve the purpose of the rule, which is only to assure that both parties are not caught by surprise. There is no reason why the Tribunal should refuse admission if the opposing party agrees to admit the documents.

Another matter which was addressed by the Hearing Panel in *Interim Decision No. 570* was the competitive aspect that arises during the course of any hearing:

> Lawsuits attempt to resolve disputes between adversarial parties. Although an objective in a lawsuit is to get the right answer, the primary goal of the lawsuit is to determine which party wins and which party loses. In workers' compensation proceedings, the issue is not whether the employer or the worker should win. The issue in a worker's appeal is whether a worker is entitled to workers' compensation benefits which, in this case, are paid out of an accident fund to which all Schedule 1 employers contribute. In workers' compensation proceedings, the paramount objective is to get the right answer on the entitlement question.

On the other hand, to simply refuse admission of relevant evidence and carry on with the hearing, results in greater injustice than would initially be apparent.

If evidence, relevant to a determination of the truth, is treated as secondary to the rules of procedure, the hearing does becomes a "contest" where the rules determine whether one party wins or loses the game.

If entitlement is incorrectly denied, injustice is done to the injured worker.

If entitlement is unjustly established, the message to the worker is that entitlement was not given on the basis of the merits of the case, and may well be refused in the future, by the rules of the same game.

The employers lose respect for a system of compensation, which does not promote principles of fairness but appears to be premised on whether the parties understand and are in control of the conduct of the appeal, within the established procedure.

The Tribunal has suggested in the past that the system will function without the necessity of either party seeking expert representation.

The process is informal, when compared to the traditional court room setting but workers' compensation appeals are also, obviously, legalistic, with the establishment of a body of precedent, limitation periods, and legal argument with respect to admissibility, burden of proof and standard of proof. It

is indisputable that an advantage is held by the party who has developed sufficient expertise or has hired expert representation.

The three week rule, which acts implicitly as an exclusionary rule if evidence, is one more cog in the compensation machinery which impairs accessibility to legitimate claims. Workers are faced with an expensive new cost — representation — usually at a time when the cost is least affordable. Workers essentially compete with the financial resources of their employer, for the most effective representation.

The affect of the rule and its potential for blind application, creates a risk that the Tribunal will come to the wrong conclusion. The potential increases if the only persons with expertise in the system are the decision makers and Tribunal Counsel, who did not include the evidence in the Case Description in the first place.

The policy behind the rule is sensible. While the parties should try to meet the time limits imposed on their preparations, and production of new evidence on the day of hearing should be discouraged, it must also be recognized that a party who is able to reveal and present relevant evidence to the Tribunal, that has not been included in the Case Description, is actually furthering the process and the Tribunal's search for the truth. Even evidence that takes a party by surprise can equally become the most relevant evidence to establish what is the "truth".

Any apprehensions that the Tribunal may have as to the affect of "surprise tactics" and the inability of the other party to respond to new evidence, whether submitted in the form of documents or elicited from a witness in the course of the appeal hearing, can easily be resolved by post-hearing investigation at the instigation of the Tribunal and post-hearing submissions from the parties.

While the three week rule is an excellent procedural guideline and administrative mechanism, it is a poor second to a judicial determination of the admissibility of evidence that is required by the statute.

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Review of Industrial Disease Decisions Prepared for the Tribunal Counsel Office

Linda Gehrke*

The Tribunal Counsel Office of the Workers' Compensation Appeals Tribunal has undertaken a review of the decisions of the Appeals Tribunal concerning Industrial Diseases published on or before May 31, 1987. The following summary of that research is provided for the benefit of the Forum's readers on the explicit understanding that this summary has not been approved by the Appeals Tribunal and is not binding in any way on subsequent hearing panels of the Tribunal. Each appeal at the Tribunal is determined on its individual merits and persons should refer to the entire text of the Tribunal's reported decisions when preparing their appeal.

This commentary will be divided into the following sections:

1. What is an Industrial Disease?
2. The Causal Relationship in Industrial Disease Case.
3. Evidentiary Issues in Industrial Disease Cases.
   a. Exposure Data.
   b. Medical Evidence Regarding Diagnosis and Etiology.
   c. Epidemiological Evidence and Medical Literature.
   d. Board Guidelines.
   e. The Section 122(9) Presumption.
4. More than One Employment.
   a. Apportionment and Contribution.
   b. Notice to Employers.

WHAT IS AN INDUSTRIAL DISEASE?

The pre-April 1985 Act, which will remain relevant so long as workers became disabled by industrial disease prior to April of 1985, provides in section 1(1)(n) that "industrial disease" means any of the diseases mentioned in Schedule 3 and any other disease peculiar to or characteristic of a particular industrial process, trade or occupation. The least problematic cases are those where the disease which has been diagnosed is listed in Schedule 3.

Where a Board guideline exists, as for example with respect to silicosis or vibration white finger disease (Raynaud's phenomenon — see *Decision No. 490*) or mesothelioma (see *Decision No. 774*), it can be assumed that the disease is an industrial disease, since it has been recognized as such by the Board, at least within the circumstances set out in the Board's guideline. The Board's guideline thus serves as an alternate to Schedule 3 in designating certain diseases as industrial diseases. Most guidelines provide exposure criteria and some guidelines provide latency periods which must be met in order to qualify as an industrial disease under that guideline. The guidelines regarding industrial disease also provide that claims which do not meet the criteria set out in the guideline shall be individually judged on their own merits having regard to the evidence submitted and that the benefit of doubt applies: See the Board policies pursuant to section 122-(1), *Claims Services Division Manual*. Where there is no listing in Schedule 3 and there are no guidelines, many conditions are referred to the Industrial Disease Consultant: See *Claims Adjudication Branch Procedures Manual*, Document #33-13-01, Exhibit #1.

The meaning of the words "peculiar to or characteristic of a particular industrial process, trade or occupation" has not been discussed in any great detail by the Tribunal's decisions to date. In *Decisions Nos. 46, 93, 268,* and *884,* in the absence of evidence relating to industrial disease, the Tribunal proceeded to consider the worker's condition under section 1(1)(a)(iii), the "disablement" clause of the section defining the meaning of "accident".

THE CAUSAL RELATIONSHIP IN INDUSTRIAL DISEASE CASES

In *Decision No. 46* the Panel comments at p. 2:

> The Workers' Compensation Act specifically requires a causal relationship between the disabling condition and the employment regardless of whether one characterizes the disabling condition as a "disablement" as defined in section 1(1)(a)(iii) of the Act or as an industrial disease as defined by section 1(1)(n) of the Act.

Case law supports similar causal tests whether the case concerns accident or industrial disease: See *Decisions Nos. 72* and *46* and the cases of *Dunham v. Workmen's Compensation Board* (1967), 67 D.L.R. (2d) 726 (N.B.C.A.); *Clover, Clayton & Co. Ltd. v. Hughes* [1910] A.C. 242 (H.L.); *Bonnington Castings Ltd. v. Wardlaw* [1956] A.C. 613; *McGhee v. National Coal Board* [1972] 3 All E.R. 1008 (HL). Generally speaking these cases, which range from accident to industrial disease, adopt a causation test of material or significant contribution. The question of what is a "material contribution" is addressed by the House of Lords in *Bonnington Castings* at page 621: "What is a material contribution must be a question of degree. A contribution which comes within the exception de minimis non curat lex is not material, but I think that any contribution which does not fall within that exception must be material". These cases do not appear to exclude the possibility of more than one significant or material causative factor. For a discussion of these concepts, see *Decision No. 915* at page 100.

While the significant causative factor test has been adopted in decisions of the Tribunal, the Tribunal has not addressed a case where both the work environment and outside factors such as cigarette smoking were significant factors. In *Decision No. 46* the Panel first concluded that the work place was not a significant cause and then concluded that the evidence disclosed that the worker's history of cigarette smoking might constitute a significant factor. In *Decision No. 490* the Panel concluded that aside from the work place exposure to vibration, there was no other significant exposure. In *Decision No. 319*, the Panel concluded that occupational exposure was not a significant contributing factor, and was at most an irritant or minor contributing factor; whereas a pre-existing condition significantly exacerbated by smoking was more probably than not the cause of the worker's condition.

EVIDENTIARY ISSUES IN INDUSTRIAL DISEASE CASES

Exposure Data

Evidence of exposure to hazardous substances in the work place has at least two functions in industrial disease cases:

1. In order to establish the causal relationship between the work and the disability, the exposure data is often seen (but not always seen) as necessary: See *Decision No. 490* which points out that it is not always possible or necessary to make a finding of fact regarding exposure.
2. Board guidelines regarding industrial disease almost always set out exposure requirements. Exposure guidelines are set out in section 122(11) of the Act for silicosis (at least two years Ontario exposure to silica dust).

Evidence regarding exposure to hazardous substances in the work place is more often than not unreliable and insufficient: See *Decisions Nos. 490, 423*, and *46*. The work history of the worker and evidence of other exposure outside the work may be sufficient to draw the necessary conclusions regarding a causal relationship without a finding of fact regarding exposure: See *Decisions Nos. 490* and *423*. *Decision No. 46* comments that the worker ought not to bear the burden of collecting exposure evidence in support of the claimant's case. If the Tribunal finds that there is reason to believe that further investigations of work place exposure would be helpful and possible to the determination of whether the work exposure caused the disability, then such investigations should be carried out by the Tribunal. *Decision No. 490* comments at pages 7 and 8: "For this Panel to seek to make a precise finding of fact on the question of the degree of exposure would be an exercise in futility, resulting in fiction." The Panel goes on to conclude in view of these circumstances that:

> a reasonable assumption as to the cause of the disability may be made even in the absence of precise reliable data on the degree of exposure. The risk to which this worker was exposed intermittently for twenty years is a recognized cause of the disability from which he suffers. We are prepared to conclude that on a balance of probabilities, the worker's disability was more likely than not a result of this industrial hazard.

Medical Evidence Regarding Diagnosis and Etiology

In industrial disease cases, the medical diagnosis often impacts upon conclusions regarding etiology of disabling condition. For example, the diagnosis of silicosis is required in order to meet the Board's guideline requirements: See *Decision No. 388* and *Decision No. 490*.

Epidemiological Evidence and Medical Literature

The concept of risk is relevant to whether the disease is peculiar to or characteristic of a particular industrial process trade or occupation. Often the best evidence to establish this risk will be epidemiological evidence and/or medical literature. See "Scientific Decision Making in Workers' Compensation: A Long Overdue Reform" Southern Cal. L.R. 1986 Vol. 59:911 at 926.

In *Decision No. 490*, epidemiological evidence and medical literature established that exposure to vibratory tools constitutes a risk. This conclusion was applied to the question whether the disease was due to any employment in which the worker was engaged. It would appear that epidemiological evidence is relevant both to whether a disease is peculiar to or characteristic of any industrial process, trade or occupation as well as in a general sense to the causal relationship between the exposure and the disease.

In *Decisions Nos. 739* and *830* the Panel in considering whether mortality studies constituted substantial new evidence with respect to cancer in nickel miners concluded that such studies raised at most a *possibility* of a causal relationship between nickel mining and cancer of the lung or larynx and therefore did not constitute "substantial" evidence. It is not the purpose of this commentary to discuss the leave requirements.

Board Guidelines

If the Board guidelines with respect for example to exposure or latency are not met then the worker must go on to show that the disease was due to the employment in which the worker was engaged: See *Decision No. 490*.

If the Board guidelines are met but a serious question is raised regarding causation then the issue must be dealt with by the Panel whether or not the Board's criteria are met: See *Decision No. 774*.

For a discussion of the significance of Board guidelines, see *Decision No. 425* at pages 4 through 5.

The Panel in that decision noted whether or not the guidelines are met strictly, the worker's disability is compensable if on a balance of probabilities it amounted to an industrial disease under section 122 of the Act, which is to be treated as a personal injury by accident. The guideline makes it easier as an administrative matter for the Board to identify what claims should be accepted. However, the Tribunal cannot rely on the guidelines as if they were the statute although they may be of assistance. The Tribunal must review the evidence to establish whether or not the disability was due to the nature of any employment in which the worker was engaged. This is recognized in the guidelines which speak of judging cases individually on their own merit.

The Panel in *Decision No. 425* further noted at page 5 that exposure levels in the guidelines amount to a finding that exposure to the hazardous substance is a "particular industrial process" within the definition of industrial disease.

The Section 122(9) Presumption

Section 122(9) provides that if the worker at or before the disablement was employed in any process mentioned in the second column of Schedule 3 and the disease contracted is the disease in the first column of the Schedule set out opposite to the description of the process, the disease shall be deemed to have been due to the nature of that employment unless the contrary is proved. The 1984 amendment to the Act contains a similar provision for Schedule 4 diseases by section 122(9), except that the deeming is conclusive rather than rebuttable.

The Tribunal has not yet considered in any written decision a case involving the provisions of section 122(9). Issues arising may include the weight and the nature of evidence required to prove the contrary in a case where the presumption is raised.

MORE THAN ONE EMPLOYMENT

Section 122(1) of the Act provides:

> 122(1) Where a worker suffers from an industrial disease and is thereby disabled or his death is caused by an industrial disease and the disease is due to the nature of any employment in which he was engaged, *whether under one or more employments*, the worker is or his dependants are entitled to compensation. . . (emphasis added)

In *Decision No. 425*, the Panel concluded that the evidence raised a likelihood that other factors besides the recent employment, including significant noise exposure in previous employment, contributed to the worker's hearing loss. The Panel commented that section 122 of the Act explicitly provides for this likelihood.

Apportionment and Contribution

In the case of Schedule 2 employers, section 122 provides that the employer who last employed the worker in the employment to the nature of which the disease was due is liable to pay the compensation, unless he brings other employers before the Board under section 122(4) and establishes that the loss was sustained while the worker was in the employment of the other employer, or the Board determines that contribution is payable under section 122(5) where the disease is one contracted by a gradual process.

In the case of Schedule 1 employers, under section 122(8) the Board shall make such investigations as it considers necessary to ascertain the class or classes against which the compensation should be charged and shall charge or apportion accordingly.

In *Decision No. 425*, the Panel concluded that the evidence satisfied the Panel that noise exposure over a number of employments was more probably than not the cause of the worker's hearing loss.

Since the employer was a Schedule 2 employer, it did not qualify for apportionment under section 122(8). Section 122(2) of the Act applies instead together with the alternative apportionment provisions of section 122(4) and (5).

In the result the appeal was denied. The worker's entitlement remained as determined. The Panel formally drew the employer's attention to the provisions of sections 122(4) and 122(5) should they wish to make application to the Board for relief of costs.

Notice to Employers

Section 122(10) provides that the notice provided for by section 20 shall be given to the employer who last employed the worker in the employment to the nature of which the disease was due and the notice may be given notwithstanding that the worker has voluntarily left the employment.

Section 20(5) provides that failure to give the prescribed notice or any defect or inaccuracy in notice does not bar the right to compensation if in the opinion of the Board the employer was not prejudiced thereby or, where the compensation is payable out of the accident fund, if the Board is of the opinion that the claim for compensation is a just one and ought to be allowed.

The issue of notice to employers in industrial disease cases may arise where the etiology of the disease may involve exposure in more than one employment. This issue has not yet been addressed by written decision of the Tribunal.

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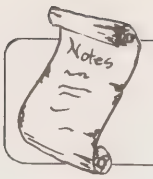

Notes

Some Theoretical Contradictions Behind Section 86n

Orlando Buonastella*

In view of the W.C.B. Board of Directors' 86n review of Workers' Compensation Appeals Tribunal *Decision No. 72*, we should take the opportunity to reflect on the more *general* implications of section 86n. It is our view that there are some theoretical contradictions at the very roots of section 86 which undermine the independence of the Tribunal.

Professor Weiler's "formula" in setting up an independent Tribunal can be summed up as follows: make the Tribunal truly independent, with a Chairman with a high legal profile, and you will get some finality in the appeals system. Injured workers will accept that and respect the Tribunal's authority. In rationalizing the need for an independent Tribunal, Professor Weiler said:

> What is lacking in the current model is the perception of the structure for review in Workers' Compensation as truly *independent* of the administrative process which has generated these thousands of appeals every year . . . This is why there is a continuing refusal to accept the legitimacy of adverse compensation decisions, the serious erosion of finality in the system . . . (The Chairman of the W.C.A.T.) should have a staff of bright young legal and administrative assistants to help him coordinate the flow of work and preserve coherence in decision-making across the many panels. (*Reshaping Workers' Compensation for Ontario*, pp. 111, 116.)

It is on this theoretical basis that the new W.C.A.T. was set up, with the emphasis on independence and based on a deliberate choice in favour of more law and less administrative discretion.

Well, so far so good, except that Weiler made a *second* theoretical formulation that, in our view, destroys the very essence of his first premise — the independence of the Tribunal. His second formulation is this:

> Suppose it is claimed that the judgment of the appeal panel in a single case rested on a stated general principle which is incompatible with the interpretation of the statute or the established policies of the Board, *which has to deal with hundreds, even thousands, of such cases every year.* Who should have the final say? I believe it should be the Workers' Compensation Board . . . If there still remained a dispute about who was right, the Workers' Compensation Board or the Workers' Compensation Appeal Tribunal, the government of the province would have the matter thoroughly aired and squarely presented to it for legislative resolution. (emphasis added) (*Reshaping Workers' Compensation for Ontario*, p. 116)

In our submission this second theory is incorrect for the following reasons:

> (1) The reason for Weiler's choice of the W.C.B. over the W.C.A.T. seems to be dictated by administrative concerns — the fact that the Board deals with hundreds, even thousands of cases a year — instead of the concern for the proper interpretation of the Act upon which each appeal has to be based. In fact, the poor experience with the previous in-house Appeal Board shows that the fact that the Board deals with thousands of cases a year does not make it the best "interpreter" of the *Workers' Compensation Act* — far from it!
>
> (2) It is beyond doubt, in our view, that *any* section 86n review will be seen by injured workers and other workers as an interference with the independence of W.C.A.T., thus undermining their confidence in, and acceptance of, the finality of its decisions.
>
> (3) Under Weiler's scenario, the final decision-maker on appeals becomes the provincial government! So much for W.C.A.T.'s "finality"! This aspect also raises obvious theoretical and practical issues, not the least of which is the potential for a total paralysis of the compensation system. It would conceivably take up to five years for an appeal to go through the whole process of Hearings Officer, W.C.A.T., Reconsideration, section 86n and hearings beyond section 86n. In the meantime, other cases could not be properly adjudicated given the uncertainty over the interpretation of the "general law" of the Act. The practical implications of this paralysis and the "constitutional crisis" it would create as to who is the best interpreter of the Act — The Board or W.C.A.T. — should not be underestimated.

Because of the real potential of such a development, it is our hope that the W.C.B. Board of Directors will use its discretion by avoiding the creation of a situation it will not benefit from, while the legislators will work at fixing the problem at the source.

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Back Injury and Compensation

Richard Fink*

In the United States, industrial back injuries account for 25% of all claims and benefits. The cost of an average low back injury is also 40% higher than the average benefit for other parts. There is every reason to believe that the situation is the same in Canada.

In order for an employer to dispute the expensive and lengthy entitlement generated by back disabilities, a working knowledge of how the back functions mechanically, and the means for discovery of malfunction, is imperative. Besides poking about orthopaedic textbooks, a good source of information is *Spine Magazine*, published 10 times per year by Harper & Row, Publishers Inc. of Philadelphia. Orthopaedic and research doctors from all over the world submit studies there for publication. Although articles such as "Erythrocyte Survival Following Intraoperative Autofusion" are not of much interest to the layman, an entry discussed later in this paper entitled "Railroad Worker's Disability and Compensation" obviously is. This article looks at 5 studies relevant to Workers' Compensation practice published in *Spine Magazine* over the last year.

The "Optimum Spine" is an article which appeared in the summer of 1986. It is written by Dr. Gracovetsky, a mathematics professor at Concordia University and Dr. Farfan, a doctor at St. Mary's Hospital in Montreal. The authors combine mathematics with biology to challenge current theories of back disease. Their opinions have important implications for the reduction of back injury, Second Injury and Enhancement Fund Relief, and when back pain is on account of a specific work activity.

According to the authors, the Morris model of back physiology states that the erector muscles at the side of the body, and abdominal pressure are mainly responsible for lifting loads. The authors point out, however, that it had been demonstrated that the bent spine does not require the support of the erectors when a small load is lifted. The authors then illustrate that loads are lifted through an interaction of muscles, ligaments, facet joints, and discs all connected to the vertebrae. The interplay of these parts establishes the maximum amount of stress that can be tolerated. The stress takes two forms: "Axial compression overload" (forward bending movement), and "Axial torsion overload", (twisting). In a torsion injury the initial damage is to the outer range of the disc, and the other parts of the vertebrae then suffer consequential damage.

The lifting mechanism of the spine includes disc, tendons, muscles and facet joints. The mechanism works properly when the back is bent (flexed), which draws these components into operation. The basic task executed by a manual worker consists of lifting a moderate load, carrying it some distance and putting it down. The back lifting technique often recommended calls for bending at the knees and attempting to keep the spine straight (maintaining lordosis). The authors suggest it is more important to flex the spine forward while keeping the object lifted close to the body.

The authors go on to illustrate that normal walking causes a torsional load on the back. Thus, when a worker is walking normally with a straight back carrying a load by hand, the worker is causing double stressing of the back. The authors suggest that walking bent over like a hiker carrying a back pack on his shoulders, or as in the Far East where the load is divided into two baskets disbursed on a pole resting on the shoulders, is far superior. In addition, smaller steps decrease the torque on the back.

Doctors Gracovetsky and Farfan are of the view that with each "over torquing" of the spine by falls, blows, and improper lifting and carrying, the outer rings of the disc are damaged, and the back as a mechanism deteriorates, producing disfunction and pain. The authors state that the traumatized disc is improperly called degenerated, when in fact it has been repeatedly injured. The 40 year old worker at your plant who feels pain upon lifting a 10 pound box may not be suffering from the ill effects of a back disability at your plant. That worker, according to this study, could be suffering from pain as a result of repeated spinal injury incurred at other places of work.

New diagnostic methods are used to determine the type and source of back injury. An employer seeking Second Injury and Enhancement Fund relief on account of a "pre-existing condition" needs some understanding of the relative reliability of these new diagnostic methods.

There are 7 major diagnostic methods, for example, used to diagnose whether a patient has a symptomatic herniated disc:

1. Clinical Examination: The doctor physically examines the patient, checking for leg pain or numbness following the nerve paths in the leg and foot, straight leg raising restrictions, muscle weakness and impairment, etc.
2. Myelography: Dye is injected into the back and an x-ray reads whether a herniated disc causes the dye to change its path.
3. Computerized Tomography: Multiple x-ray pictures taken after an injection are then sorted out and compiled by a computer. A CT Scan is noted for producing excellent pictures of bone.
4. Nuclear Magnetic Resonance Imaging: This technique takes a view of internal organs by focusing

on hydrogen atoms. It offers superior images of soft tissue such as a vertebral disc.
5. Thermography: After liquid crystal elastomeric sheaths are applied to the legs, a polaroid photograph is taken of the crystals. The crystals change colour with temperature displaying skin and temperature distribution. This produces a pattern of colours, known as a thermogram.
6. Electromyography: The nerve pathways are tested electronically for disturbance.
7. Discography: The discs are injected and then looked at through computerized x-ray equipment.

A study in the June 1986 issue of *Spine Magazine* by Mills et. al. entitled "The Evaluation of Liquid Crystal Thermography in the Investigation of Nerve Root Compression Due to Lumbosacral Lateral Spine Stenosis" found that thermography results were confirmed during the surgeon's actual operation only 48% of the time, while clinical examination results were confirmed 76% of the time.

In the same issue, an article by Morris et. al. entitled "Diagnosis and Decision Making in Lumbar Disc Prolapse and Nerve Entrapment" found that positive results from a clinical exam plus a metrizamide myelogram correctly predicted almost all patients with a disc prolapse. Computerized Thermography and Nuclear Magnetic Resonance Scanning were not nearly as reliable. The authors comment: Both CT and NMR Scanning lack proper normal controls and tend to overread.

The March 1986 issue of *Spine Magazine* carried a timely article entitled "Railroad Worker's Disability and Compensation", by Sander and Myers. They chose at random 126 cases of low back injuries, half of which occurred at home or outside of work and half of which occurred at work, among employees of the Southern Pacific Railroad. The two groups were similarly balanced as to age, sex and degree of disability. Workers injured on the job for the Southern Pacific Railroad are covered by the Federal Employer's Liability Act, a compensation scheme more generous and more litigious than the usual American workers' compensation programs.

The study found that the 35 workers suffering from lumbosacral strain-sprain injuries at work were off work for an average of 14.9 months, compared with 3.6 months for the 30 employees who were injured while off duty. Eighteen patients with post-operative backs injured at work were off an average of 9.3 months after surgery, while 19 with post-operative backs injured off duty were off work for an average of 4.4 months. The authors concluded: "It appears that the financial rewards of Compensation prolong recovery".

Although few employers will be surprised at this finding, the study is ammunition for two important pleadings made by employers:
1. If a particular worker is off for 10 extra months because he wants more money, why should an individual employer pay the cost? Rather, the extra time should be charged to the Second Injury and Enhancement Fund.
2. Why does not the Workers' Compensation Board more assiduously monitor and treat back disability cases to cut down on monetary gain as a disabling factor?

Back injuries may be costing Ontario employers 250 million dollars per year. The Compensation Board and Appeals Tribunal must decide every day whether a condition is disabling, and whether it relates to work activity. Failure to develop maximum expertise on the science of the back renders this task a charade. Articles like these help in developing the necessary expertise.

**Richard Fink is a barrister practicing with the firm of Fink and Bornstein in Toronto.*

Letters to the Editor

The Role of the Tribunal

Michael Cormier's article in the April 1987 issue of the *Forum* addresses a number of issues concerning the Tribunal's definition of its role and the means it has adopted for pursuing that role. As the Tribunal's experience with the operational realities of those concepts as originally defined grows, many of these issues continue to be a matter of internal discussion at the Tribunal as well.

In the interest of sharpening the debate, I should like to put to Mr. Cormier and to other readers a number of questions which continue to trouble me and which Mr. Cormier's article does not, I think, address.

First, there is the issue concerning the nature of the Tribunal's investigative role. Mr. Cormier argues that the Act intended to confine the Tribunal's investigative powers to the investigation of medical facts. He is not explicit, however, as to how that view can be squared with the wording of the Act — with, for example, the instruction to base decisions on the true merits and justice, and with the fact that the Board's powers of investigation under section 81 — powers which obviously reflect the *Board's* full investigative mandate — are extended unchanged to the Tribunal.

Furthermore, if the Tribunal is right in its view (expounded most recently in *Decision No. 915*) that its role is to determine benefit rights as of the date of the Appeals Tribunal hearing, who, if not the Tribunal, is to be responsible for any investigation necessary in respect of events since the Board's last decision? To say that evidence development in respect of events that have occurred since the Hearings Officer's hearing is the employer's or worker's obligation is to impose in the post-WCB phase of the rights determination process a role for the parties which they are not required to play in the rights determination process at the Board. At the point where the appeal is made to the Appeals Tribunal, does the nature of the rights determination process change in such a way as to require the burden of evidence development to shift from the system — where it is located in the Board's processes — to the parties?

Mr. Cormier seems to accept the determination of rights as of the appeal hearing date as the correct approach. He acknowledges that the Tribunal's explicit medical investigation powers are needed "to determine changes in the medical condition or to ascertain its stability." But determining the nature or extent of a disability will often require evidence of a non-medical nature — evidence of work or daily living activities in recent months, evidence in respect of motivation or contributing outside events (to pick up on some *Decision No. 915* issues). How can assigning the Tribunal a post-Board investigative role in respect of the medical part of the evidence but denying it that role with respect to the non-medical part be justified?

A hearing panel will need additional evidence whenever the evidence is not sufficient to allow the panel to accept with confidence *any* of the *possible* answers as *probable*, or whenever the evidence presented identifies not only one answer that is, on the available evidence, probable but others which are *possible* but which have not been adequately investigated.

If additional evidence does not exist or is beyond reach of any reasonable investigation, the consequences are clear. In the first situation, assuming a worker appeal and an entitlement issue, the worker will be held not entitled to benefits. In the second situation, the one answer which the available evidence establishes as probable will prevail. If the additional evidence could be turned up by a reasonable investigation, the consequences will nevertheless be the same unless that investigation is undertaken. The fundamental question raised by the first part of Mr. Cormier's article is: Who has the basic responsibility for initiating the investigation in the latter circumstances?

On medical issues, Mr. Cormier agrees that it is the Tribunal. On non-medical issues, he says it is the worker and the employer. My questions are:

1. What are the principles of adjudication process that would justify that difference?
2. Can that theory accommodate the characteristic presence of un-represented or under-represented interests?

The issue of the Tribunal's investigative role is, in fact, inextricably tied to the issues of the nature of the appeal and the adversarial/non-adversarial nature of the Appeals Tribunal's process. If the Tribunal's current views on those issues as set out in the Technical Appendix to *Decision No. 24* are seen to be right, acceptance of the investigative role in respect of both medical and non-medical issues seem to me to follow. Does not any challenge of the Tribunal's investigative role have to be considered in that broader context?

Mr. Cormier's impression that, to date, the Tribunal has not, in fact, engaged in any non-medical investigations, is incorrect. Non-medical investigation in the form of panel-member questioning, during a hearing, on non-medical issues raised on the panel member's own initiative is commonplace, and telephone investigations by the Tribunal Counsel Office members focussed on clarifying financial or

employment information and like matters is not unusual. In one case, a post-hearing ergonomic study of the job in question by the Safety Studies Service of the Ministry of Labour was requested by the hearing panel (see Decision No. 66). Pre-hearing field investigations by the Tribunal have not, however, occurred, and, generally, the use of the non-medical investigative power has been quite limited.

The limited use of the investigative power does not, however, reflect any concern amongst panel members or Tribunal counsel about the existence or legitimacy of the power nor does it reflect an explicit policy decision to minimize non-medical investigation. We apparently have simply rarely found it necessary to order significant non-medical investigations. Understanding the reasons for that experience is obviously important to any analysis of the Tribunal's investigative role.

Part of the reason is that, as Mr. Cormier points out, a large proportion of factual issues do indeed relate to old events. In respect of such events, evidence development will normally have already occurred or will no longer be realistically feasible.

Another important influence has been the Tribunal's ability in many cases to pass the investigative role back to the Board. Whenever the Appeals Tribunal differs with the Board, particularly on entitlement issues, sub-issues which the Board has not yet considered will arise. If the Tribunal's hearing panel is not satisfied with the evidence before it on any of those sub-issues, it is natural to refer those back to the Board. This accords with section 86(g)(2) and makes sensible use of the Board's expertise and investigative resources. Thus, in *Decision No. 268* — to mention only one instance — the Panel found entitlement in respect of the worker's tennis elbow but referred back to the Board for investigation the extent to which the elbow condition had been the actual cause of the worker's various absences from work in the intervening months.

The third circumstance which reduces the occasion for Tribunal non-medical investigations is, of course, the fact that the parties often do accept the role of evidence development, to some extent.

However, even given those various substantial influences, it is surprising that in the many cases handled so far the Tribunal would not have encountered more situations in which the Panel or Tribunal counsel felt or should have felt the need for substantial non-medical investigation which had not been undertaken by the parties or the Board. It is an aspect of our experience that obviously merits some review.

In the latter part of his article, Mr. Cormier takes issue, as many do, with the in-hearing role of Tribunal counsel intervening to ask questions and make submissions. Mr. Randal Kott's article touches on similar concerns. Mr. Cormier, like others, suggests that in circumstances where the appellant's case is not adequately tested by an opposing party, it is preferable to have the Hearing Panel, rather than the Tribunal counsel, do the testing.

There are, it seems to me, a number of questions with which proponents of that concept rarely deal.

First, how is the standard of testing of an appellant's case to be maintained when large numbers of panel members and chairmen are employed in the process?

Second, why is it thought that a worker appellant being cross-questioned by a member of the Tribunal Counsel Office will feel less confident about the fairness of the proceedings than if he or she is cross-questioned by members of the Panel? Any advocate who has been in a court situation with an unsophisticated client and an interventionist judge appearing to be attacking their case, surely cannot be confident that from the point of view of a party's perception of fairness and of lack of bias, active and pre-prepared cross-questioning from the "bench" is preferable.

Third, do appellant advocates really want to put hearing panels in the position of having to do the intensive pre-hearing preparation that is necessary if they are to be responsible for effectively testing each party's case? They are experienced advocates not concerned about losing the traditional opportunity to influence the development of an adjudicator's initial impressions?

I must, of course, acknowledge that the Tribunal's use of its counsel has evolved over the months to the point where they are now, in fact, appearing in only about one-quarter of the cases. And their in-hearing role continues to be a matter of internal debate. The move to limited in-hearing appearances of counsel reflect both a resource problem — the preparation phase of the counsel's work takes substantially more time than we had anticipated (and an effective in-hearing role more experience than we had thought) — and the increasing confidence of at least the full-time panel members that they can test and understand most cases effectively without the assistance of either opposing counsel or Tribunal counsel. It represents, in effect, a drift towards a true inquisitorial system of adjudication which I personally find worrisome.

I question whether critics of the in-hearing role of the Appeals Tribunal counsel have sufficiently considered the long-term implications of their absence for the role of the adjudicators in the process. The *constant* presence of unrepresented or underrepresented interests in our hearings *is* a major influence on the developing nature of our adjudication process. That is a pervasive reality. Constructive criticism of the in-hearing role of Tribunal counsel must take realistic account of the long-term implications of their absence for the overall process having due regard for that reality. I have yet to see any criticism of the "problem" of the in-hearing role of counsel which attempted any serious assessment of the alternatives in our particular circumstances.

This letter to the Editor from the Tribunal Chairman obviously represents something of a departure from traditional practice. It is evident that a public exchange with advocates or academics outside the hearing/decision forum, on issues such as this, presents a number of potential pitfalls for a tribunal chairman — perhaps, particularly for one who chairs a tripartite tribunal. However, in my view, the workers' compensation field has long suffered from a lack of sufficiently informed debate on substantive and procedural issues. (The publication of the *Forum* is, itself, an attempt to address that lack.) And it seems to me that, at this stage, responses from members of the Tribunal itself focussed not on defending a point of view or on providing answers, but on clarifying and illuminating issues, will, in some areas and on some occasions, have the potential for contributing uniquely to the pertinency and quality of debate. In my view, in those circumstances, responses of that nature are not inappropriate and may be particularly useful.

S.R. Ellis
Tribunal Chairman

Legal Causation in Workers' Compensation Matters

If at all possible, I would be interested in reading an issue of the *Forum* devoted to the topic of legal causation in workers' compensation matters. I suspect that this would be of interest and possibly useful to other readers and to members of the Tribunal.

Nicole Godbout
Industrial Accident Victims' Group of Ontario (IAVGO)

Editor's Response

Thank you for your timely letter suggesting a special issue of the Compensation Appeals Forum devoted to a discussion of the legal causation issue in workers' compensation matters. The issue of legal causation is a source of complication in many cases. The Editors accept gladly your idea for a special issue on this topic and invite our readers to write articles for the spring 1988 issue of the Forum. It would be most interesting if the writers for this special issue could comment on the differences between medical and legal causation as the term ''causation'' is used in both law and medicine and writers do not always specify which way they are using the term. We would also encourage commentary comparing causation issues in tort and workers' compensation contexts, or discussion of the various points at which causation issues arise both in the legislation and in the course of a claim. Articles for the Forum should be between 2,000 to 3,000 words in English or French. Original theoretical articles would be welcome, as well as descriptive ones describing individual experience with the issue in a specific case. A bibliographic survey of existing literature on the topic would also be welcome, as would critical reviews of published books and/or articles on the topic.

R. Rickwood
Head of Research and Publications

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